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No. _____

In The

Supreme Court of the United States

October Term, 1992

HOWARD W. FISCH, JR., INDIVIDUALLY AND ON BEHALF OF ALL CO-DEFENDANTS AND CO-TENANTS,

Petitioners,

vs.

RANDALL MILL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the conditions imposed on owners of mineral rights under Georgia's mineral rights lapse statute exceed the reasonable conditions and minimal burdens test mandated by this Court under *Texaco v. Short*,[1] deny the owners of mineral rights due process, and constitute an unconstitutional taking of property.

   (In its answer to this question, without directly addressing the standards enunciated in *Texaco v. Short*, the Georgia Supreme Court held that in order to meet the statutory requirement of working, or attempting to work mineral rights, or to pay taxes due thereon, an owner must either carry on an operation to explore for, use, produce, or extract minerals from the land or an owner must file a writ of mandamus to compel the tax commissioner to assess ad valorem taxes where an owner of mineral rights repeatedly attempted to file a return to pay taxes on the mineral rights and the return was refused by the tax commissioner's office because there was no provision for filing or paying taxes on mineral rights.)

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[1] 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). The decision of the Georgia Supreme Court is inconsistent with the applicable decisions of this Court. Sup. Ct. R. 10.1(c).

LIST OF ALL PARTIES IN COURT BELOW

Randall Mill Corporation
Howard W. Fisch, Jr., Individually and on behalf
of all Co-Defendants and Co-Tenants as follows:
The Heirs of P.H. Randal(l)
H. Pace, H.I. Randal(l)
R.A. Randal(l)
B.P. Randal(l)
C. Randal(l)
L.K. Powell
P.N. Clark
and all other persons having
an interest in certain mineral
rights in land lots 170 and 180 of
The 17th District of Fulton County
including but not limited to the
following individuals:
Amy C. Randall
Albert Alton Clarke, Jr.
Howard Graves
Evelyn Schier
Elizabeth R. Layfield
Gladys R. Tye
L.H. Randall, Jr.
Helen R. (Mrs. William C.) Shreve
Richard Roan Randall
Vera R. Wilkie
Sara Presley Cantrell
Robert H. Randall
William Lane Randall
Nancy Chappell Randall (Mrs. Randy) Boswell
Mrs. Lynda Collins
Frederick Clerk Schoeck
Mrs. Eugenia C.(John) Head

LIST OF ALL PARTIES IN COURT BELOW – Continued

Mrs. Jimmie Randall Lord
John Clyde Randall
Fannie Mae Randall Robinson
Steven Brown Randall
Marilyn Putnam
Rela R. Anderson
Mary S.C. Beckworth
Mrs. Alberta C. Walker
Robert Harold Randall, Jr.
Travis Randall
Miss Randall
Ronald Randall
Jimmie E. Gellespy
Catherine "Kay" G. Alcock
Mrs. Pat (Ted) Mitchell
Coby Randall Landers
Mrs. Autrey (P.H.) Randall
Louis Randall
Mrs. Elizabeth G. Phillips
Mrs. Ernestine R. Starbuck
Mr. Bragan
Mrs. Frances (J.W.) Walker
Farish Alton (Jack) Clarke

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[2] 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, Howard W. Fisch, Jr., ("Fisch"), respectfully prays that a Writ of Certiorari be issued to review the opinion of the Supreme Court of Georgia rendered in the case on March 15, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia decided on March 15, 1993, is reported at ___ Ga. ___, 426 S.E. 2d 883 (1993), and is reproduced in Appendix A to this Petition, beginning at page 1a. The orders of the Superior Court of Fulton County, Georgia, denying Petitioner Fisch's motion for summary judgment and granting Respondent Randall Mill's motion for summary judgment, entered on January 28, 1991 are reproduced in Appendix B to this Petition beginning at page 6a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 15, 1993.[3] The jurisdiction of this Court is timely invoked within 90 days after entry of the judgment pursuant to 28 U.S.C. § 2101, 28 U.S.C. § 1257 and Sup. Ct. R. 10.1(c), 13.

[3] Pet.App. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved in this case, the Fifth and Fourteenth Amendments to the United States Constitution, and the pertinent Georgia statute, O.C.G.A. § 44-5-168, are set forth in Appendix I beginning at page 47a.

In this case, despite Petitioner's repeated attempts to comply with Georgia's mineral lapse statute to preserve his mineral rights, by *inter alia*, filing an affidavit with the Clerk of the Superior Court in the county in which the property is located stating that he was working or attempting to work his mineral rights, and by attempting to file a return to pay taxes on the mineral interests, the Supreme Court of Georgia held that Petitioner had failed to comply with the statute and that the surface owner had gained absolute title to the property.

This case is a different case from previous mineral rights lapse cases decided by this Court because here the Petitioner has performed certain acts (which are the same acts that have been upheld by this Court as reasonable conditions whereby an owner could avoid the risk of abandonment of his interest) in an effort to comply with the statute rather than stipulating that no efforts were made to preserve the rights and contesting the authority of the state to enact a mineral rights lapse statute.

STATEMENT OF THE CASE

Randall Mill Corporation (hereinafter referred to as "Randall Mill"), brought a Petition for Declaratory Judgment against the heirs of P. H. Randall (Petitioner) in the Superior Court of Fulton County, Georgia seeking to acquire title from them to mineral rights in property, hereinafter described, pursuant to the provisions of Georgia's mineral rights lapse statute, O.C.G.A. Section 44-5-168 (hereinafter sometimes referred to as "the Statute")[4]. Randall Mill claimed an interest in the property by and through that certain Executor's Deed dated October 18, 1989[5] between the Executors of the Storza Estate and Randall Mill (the property which is the subject of this case may hereinafter sometimes be referred to as "the property"). The Executor's Deed provided that it was:

> Subject to the restrictions, prohibitions, conditions and covenants set forth in the next paragraph below and those matters more particularly described on *Exhibit "B"* attached hereto and by reference made a part hereof.[6]

Exhibit "B" of the Executor's Deed is entitled "Permitted Exceptions" and lists permitted exceptions to Tract 1, including, under Paragraph 5 the following:

> Minerals and rights reserved in that certain Warranty Deed from P. H. Randall to Mrs. Neppie Clark, dated May 23, 1879, recorded on July

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[4] Pet. App. 48a.

[5] Pet. App. 8a.

[6] Pet. App. 9a.

14, 1911 in Deed Book 311, page 318, records of Fulton County, Georgia.[7]

Howard W. Fisch, Jr. (hereinafter referred to as "Fisch"), Petitioner and one of the Defendants sued by Randall Mill in the Superior Court of Fulton County, Georgia, is an heir of P. H. Randall and others, who by virtue of certain reservation of mineral rights and deeds, is a co-tenant owner of mineral rights in and to certain real property located in Fulton and Cobb County, Georgia which includes the property in this case[8]. There was no dispute in the proceedings below that the mineral rights were reserved under the deed and that the Petitioner and those who he represented were the owners of the mineral rights. However, Randall Mill alleged that Petitioners lost their mineral rights in the property as a result of their failure to preserve those rights in the manner prescribed by O.C.G.A. § 44-5-168.[9]

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[7] Pet App. 17a.

[8] Pet. App. 23a-24a. The real property which is the subject of this action is comprised of a certain tract and parcel of land lying and being in Land Lots 179 and 180 of the 17th District of Fulton County, Georgia.

[9] *See*, Pet. App. 48a. Pursuant to the provisions of O.C.G.A. § 44-5-168, under certain circumstances an owner of mineral rights, his heirs or his assigns, which hold the rights pursuant to a reservation of rights contained in a deed, may lose mineral rights by adverse possession "if such owner of the mineral rights, his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid any taxes due on them . . . for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition as provided in subsection (b) of this Code Section." O.C.G.A. § 44-5-168(a). There is no provision for the filing of a notice of claim of interest under the Georgia statute as there is in most states. *See*, note 32, *infra*.

Contrary to Randall Mill's assertions, Fisch submitted uncontroverted evidence that in both his and his expert's opinion, he has worked and attempted to work, for many years, to identify, work and preserve his mineral rights.[10] Fisch tried on at least two occasions in the seven years prior to the action filed by Randall Mill to report the subject property, among others, for ad valorem tax purposes in Fulton County, Georgia, and was told by employees in that department that there was no provision for filing or paying taxes on subsurface mineral rights separate and apart from the surface rights.[11] Finally, on his third attempt to file taxes, on March 1, 1990, after the applicable dates as set out in the statute, accompanied by his attorneys, Fisch was successful in having the Fulton County Tax Assessor's Office accept for filing his return for taxes and accept a tender of taxes on the property.[12]

In addition, on or about April 15, 1983, and again on April 3, 1990, Fisch filed an Affidavit Affecting Title to Real Property, which included the subject property.[13] The Affidavits clearly stated that Fisch was working or attempting to work his mineral rights. Fisch filed his

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[10] Pet. App. 23a-29a.

[11] Pet. App. 26a-27a, 44a, 45a.

[12] Pet. App. 28a-29a. The effect of the acceptance of the taxes tendered to the tax assessor's office is uncertain because the taxes may not have been due because they had never been assessed. Georgia's mineral rights lapse statute requires payment of taxes "when due." See, Pet. App. 42a-43a, 48a.

[13] Pet. App. 26a, 38a-41a.

affidavit in reliance on and in a specific attempt to comply with the provisions of O.C.G.A. § 44-5-168.[14]

In 1982-1983, within seven years of the bringing of the instant action below, Fisch was one of the Defendants in an action brought in Fulton County Superior Court, styled: *Trust Company Bank, et al. v. The Heirs of P. H. Randall, et al.*, Civil Action File No. C-93927.[15] That action involved Fisch's claim to mineral rights on property owned in fee simple by Plaintiffs therein and located in Land Lot 201 of the 17th District of Fulton County, Georgia.[16] In that action, Fisch defended his claim to the mineral rights (devolving in the same manner as those held in the subject property) which devolved upon him as a heir of P. H. Randall and others and asserted that he had worked or attempted to work the mineral rights and attempted to pay ad valorem taxes as provided in the statute.[17] The Plaintiffs in that action settled with Fisch, and Fisch was paid for his mineral rights on that property.[18]

On November 7, 1984, also within seven years of the instant action, Fisch sold to Jill Childress certain of his mineral rights interest in and to a lot located in Land Lot 200 of the 17th District of Fulton County in furtherance of his claim to all of his mineral rights (which includes the

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[14] Pet. App. 26a-27a.

[15] *Id.*

[16] *Id.*

[17] Pet. App. 24a-29a.

[18] Pet. App. 24a-25a.

subject property) and in pursuit and defense of same.[19] Petitioners assert that the sale of mineral rights also constitutes working mineral interests.

During the seven years prior to the institution of Randall Mill's action, Fisch regularly went on the property,[20] searched for vein quartz samples to detect gold,[21] collected samples and took them away in his car,[22] did research on the ownership of the mineral rights and the possibility of commercial extraction,[23] obtained assay reports of gold and other minerals,[24] studied geological maps,[25] and took the other actions set forth above.

Petitioner maintains that all of his above acts and doings were in furtherance of maintaining, working, attempting to work and preserving his said mineral rights.[26] In support of Petitioners' position, Fisch engaged an expert geologist during the proceedings in the Superior Court of Fulton County, Georgia, Professor Thomas Crawford of West Georgia College, who testified that Fisch's actions, in his opinion, were sufficient to constitute working or attempting to work his mineral rights.[27] Randall Mill disputed Petitioners' position, but Randall

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[19] Pet. App. 26a.

[20] Pet. App. 24a-25a.

[21] *Id.*

[22] *Id.*

[23] Pet. App. 24a.

[24] Pet. App. 24a-25a.

[25] *Id.*

[26] Pet. App. 27a, 29a.

[27] Pet. App. 20a-22a.

Mill offered no evidence to rebut the evidence offered by Fisch that he did in fact work or attempt to work his mineral rights in such a manner as to preserve them pursuant to O.C.G.A. § 44-5-168.

In the Superior Court of Fulton County, Georgia, Petitioner and Respondent both filed motions for summary judgment; Randall Mill on the grounds that Petitioners' mineral rights had lapsed pursuant to O.C.G.A. § 44-5-168. Petitioners filed for a motion for summary judgment on the grounds that the mineral rights had not lapsed as a result of Fisch's attempts to preserve them, in addition to the grounds that the statute is unconstitutional. The Superior Court granted Respondent's Motion for Summary Judgment solely on the grounds that the Defendants below had lost all mineral rights in the property at issue pursuant to the statute.[28] Fisch's motion for summary judgment was denied, but the court stated no reasons for its denial of Fisch's motion.[29]

Fisch then appealed to the Supreme Court of Georgia asserting, *inter alia*, that he had met the requirements to preserve his mineral rights under the Georgia mineral lapse statute, and if not, the Statute was too vague and indefinite to be constitutionally enforced under the due process clause of the United States Constitution and exceeded the reasonable conditions and minimal burdens test under *Texaco v. Short*.[30] The Supreme Court held that the statute was not vague and affirmed the trial court's order that Randall Mill Corporation had gained absolute

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[28] Pet. App. 6a.

[29] Pet. App. 7a.

[30] 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

title to the disputed mineral rights without addressing the issues raised by *Texaco v. Short*.

As for Fisch's repeated attempts to pay taxes on his mineral rights in an attempt to comply with the statute, the Supreme Court held that if "the Tax Commissioner failed to assess ad valorem taxes on his interest in the mineral rights, Fisch should have filed a writ of mandamus to compel the commissioner to act."[31] Petitioners maintain that it could not be a minimal burden or a reasonable condition to be required to file a writ of mandamus in order to comply with the statute and thus preserve his rights. Thus, in spite of repeated attempts to satisfy the requirements of the Georgia mineral rights lapse statute, Petitioners have been deprived of their property.

REASONS FOR GRANTING THE WRIT

I.

THE CONDITIONS IMPOSED ON OWNERS OF MINERAL RIGHTS UNDER GEORGIA'S MINERAL RIGHTS LAPSE STATUTE EXCEED THE REASONABLE CONDITIONS AND MINIMAL BURDENS TEST MANDATED BY THIS COURT UNDER *TEXACO v. SHORT*, DENY OWNERS OF MINERAL RIGHTS DUE PROCESS, AND CONSTITUTE AN UNCONSTITUTIONAL TAKING OF PROPERTY.

Georgia, like a number of other states,[32] has a mineral rights lapse statute which provides that the owner of

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[31] Pet. App. 4a.

[32] However, unlike the Georgia statute, the Dormant Mineral Act of Michigan provides for the simple filing of a notice of claim of interest by an owner of mineral rights in order to

the real property in fee simple may gain title to the mineral rights if the owner of the mineral rights has not taken certain actions to preserve them.[33] In order for the

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prevent lapse of rights under the statute. *See, H. John Van Stooten v. Larson et al.*, 299 N.W. 2d 704, 410 Mich. 21 (1980).

See also similar statutes in other states which provide a definite mechanism whereby one can protect mineral rights from lapse: Indiana Act of 1971, Code Annotated § 32-5-11-1 (filing of an affidavit in the office of the Clerk of Court); Louisiana R.S. 31:1-214 (1975) (registry by the Clerk to register the interests of those holding mineral rights); Michigan Statute Annotated 554-291(transfer of record of any interest shall be deemed to trigger the application of a new period of years under the statute); Nebraska Code § 57-201 *et seq.* (registration with the Register of Deeds of the county where land is situated by the filing of an affidavit; statute would also be satisfied by acquiring, selling or otherwise transferring any interest, as well as a separate provision that the recording of a verified claim of interest shall be sufficient); State laws of North Dakota § 38-18-01 *et seq.* (recording by the owner of the mineral interests at any time within twenty years would be sufficient to satisfy the statute); State laws of South Dakota § 43-30A-1 *et seq.* (Under 43-30A-3, acts constituting use of interests include: any conveyance, lease, mortgage, or assignment of the mineral interests recorded with the Register of Deeds; taxes paid; a statement of claim recorded with the office of the Register of Deeds; an instrument describing the mineral interest has been recorded in an affidavit in the office of the Register of Deeds for the county in which the mineral interests is located); Wisconsin Law Revisions § 706.057 (provides that use of an interest in minerals includes: a recorded conveyance of the mineral interest, statement of claim recorded by owner of the mineral interests).

[33] The title of O.C.G.A. § 44-5-168 reads "Adverse possession of minerals rights under certain conditions; procedure to obtain title." The Eleventh Circuit has held that "notwithstanding these references to 'adverse possession,' our analysis of O.C.G.A. § 44-5-168 and Georgia cases construing it convinces us that the statute actually is a 'lapse' statute rather than a

owner of the fee simple estate to gain title to the mineral rights, he must show that the mineral rights have been severed from the fee simple estate and that the owner of the mineral rights or his heirs or assigns "have neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition provided for in subsection (b) of this Code section."[34] Georgia Courts have held that O.C.G.A. § 44-5-168 gives the owners of severed mineral interest three ways to protect their property:

1. They may work the rights;
2. They may attempt to work the rights; or,
3. They may pay taxes on the rights.

Georgia Marble Company v. Whitlock, 260 Ga. 350, 355, 392 S.E. 2d 881 (1990). Fisch believed that his actions complied with the statute and the Georgia Supreme Court cases interpreting the statute.[35] Since the Georgia Supreme Court has held that Fisch's actions did not comply with the statute, the statute simply does not comply with the reasonable conditions and minimal burdens test

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traditional 'adverse possession law'." *Mixon v. One Newco., Inc.*, 863 F. 2d 846 (11th Cir. 1989). The Court reasoned that the statute does not require the surface owner to assert any dominion over the minerals but instead need only allege that the requirements of non-use and non-payment of taxes by the owner of the mineral rights under subsection (a) of statute have been satisfied.

[34] Pet. App. 48a.

[35] Pet. App. 27a, 29a.

set forth in *Texaco v. Short* and denies the Petitioner due process.

This Court in *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), (cited in *Hayes v. Howell*, 251 Ga. 588, 308 S.E.2d 170 (1983), and *Georgia Marble Co.*, 260 Ga. 350, 392 S.E.2d 881 (1990)), dealt in depth with the interpretation of the Indiana statute attempting to cutoff subsurface mineral rights if certain actions are not taken by the owner of such rights as prescribed by the statute.

In the *Texaco* decision, this Court held that a state has the power to condition permanent retention of property rights on performance of *reasonable conditions* that constitute *minimal burdens* to indicate a present intention to retain the interest. *Id.* at 790.

Critical to the Court's decision in *Texaco* was the fact that an owner could safeguard any mineral rights under the statute by the mere filing a statement of claim in the county recorder's office at any time during a twenty year period. *Id.* at 791-792. This Notice of Claim only had to contain the name and address of the owner of such mineral interest, a description of the land, and the name of the person giving such notice. Upon the filing of the statement of claim within time provided, it was conclusively deemed that such mineral interest was being used on the date the statement of claim was filed. *See*, Ind. Code Section 32-5-11-4 (1976).

O.C.G.A. Section 44-5-168 contains no express provision which provides for the filing of a simple notice in the Superior Court Clerk's Office of the county in which the

mineral rights are located in order to retain the rights.[36] However, Fisch did in fact, as approved by this Court in *Texaco* as a reasonable condition, file in 1983 in the Clerk's office of Fulton County, a notice Affecting Title to Real Property in which he specifically delineated his claimed interest in the subject mineral rights, among others, and that he had in fact, worked or attempted to work said mineral rights in the immediate last seven years, in the manner contemplated by the Statute.[37] This act put all parties on notice that Petitioners were not abandoning these rights but were "working or attempting to work" them.

As part of his working or attempting to work his mineral rights, Fisch filed his Notice (sufficient in and of itself under the Indiana Statute), and attempted on at least two occasions in the last five years to report such interest (including the subject property) for ad valorem taxes, have an assessment made, and pay the taxes due thereon.[38] He was refused by the Fulton County officials in the ad valorem tax office responsible for the filing and payment of such taxes on both occasions.[39] Only after his repeated attempts and after the intervention of his attorneys, did the Tax Commissioner's Office accept a filing, and a tender of taxes, on the property.[40] However, Randall

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[36] Pet. App. 48a.

[37] Pet. App. 27a, 38a-41a.

[38] Pet. App. 26a-27a. The statute requires an owner to pay taxes "due" which is problematical given the fact that taxes have never been assessed. *See*, Pet. App. 42a-43a, 48a.

[39] Pet. App. 26a, 27a.

[40] Pet. App. 27a, 28a.

Mill had already instituted its case prior to the time that the tax commissioner finally accepted Petitioner's return.[41] No taxes however, have ever been assessed.

The Indiana Act in the *Texaco* case provided definite mechanisms whereby an owner of mineral rights could protect his or her interest, unlike the Georgia statute. Fisch asserts that he has done what could reasonably be expected in order to retain and preserve his rights, and to allow them to be taken under these circumstances would, indeed, amount to an unconstitutional taking of his property without due process and adequate compensation.

The Petitioners agree that "[a]s long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties." *United States v. Locke*, 471 U.S. 84, 104, 105 S. Ct. 1785, 85 L.Ed.2d 64 (1985)(forfeiture of mining claim for failure to make timely annual filing was constitutionally permissible). However, as stated in the concurring opinion in *Hodel v. Irving*, 481 U.S. 704, 731, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), "a statute providing for the lapse, escheat, or abandonment of private property cannot impose conditions on continued ownership that are unreasonable, . . . because the statute does not allow property owners a reasonable opportunity to perform them and thereby avoid the loss of their property." The fact that taxes have never been assessed on mineral rights

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[41] See *Supra* note 12.

resulting in no taxes being "due" illustrates that attempting to pay taxes in compliance with the statute is impossible.

The Georgia statute, as interpreted in this case by the Supreme Court of Georgia, is thus either too vague to be constitutionally enforced because it prescribes no reasonably ascertainable method which imposes only a minimal burden and therefore no true opportunity for an owner of mineral rights to safeguard his or her interest, or the statute imposes unreasonable conditions and greater than minimal burdens on retention of mineral rights.

Requiring an owner of mineral rights, as specifically set forth by the order of the Supreme Court of Georgia from which this case is appealed, to either "carry on an operation to explore for, use, produce, or extract minerals in the land"[42], or to file a writ of mandamus to compel the tax commissioner to assess ad valorem taxes on an interest in mineral rights[43] so that the owner can file a return and pay the taxes, and not allowing any other method, is an unreasonable burden under *Texaco v. Short*. *See also, Hodel v. Irving* at 731 ("Critical to our decision in *Texaco* was the fact that an owner could readily avoid the risk of abandonment in a variety of ways.") The lapse of Petitioners' mineral rights in spite of the efforts of Fisch to retain them in a variety of ways clearly demonstrates the fact that the Georgia statute does not meet the reasonable conditions test under *Texaco v. Short*, denies Petitioners' due process rights, and constitutes an unconstitutional taking of property.

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[42] Pet. App. 3a.

[43] Pet. App. 4a.

CONCLUSION

The Georgia Supreme Court's requirement that an owner of mineral rights must carry on an operation to explore for, use, produce, or extract minerals in the land, or file a writ of mandamus to compel the tax commissioner to assess taxes on mineral rights, in order to comply with the mineral lapse statute and preserve one's mineral rights exceeds the reasonable conditions and minimal burdens test as enunciated by this Court in *Texaco v. Short*. The decision of the Georgia Supreme Court in this case is not only inconsistent with the applicable decisions of this Court, but also deprives owners of mineral rights due process.

The statute is also defective because it provides that an owner of mineral rights may preserve the rights by paying taxes on the mineral rights when "due."[44] However, payment of taxes is impossible since taxes on mineral rights have never been assessed[45] and thus taxes are not "due" as required by the statute. Furthermore, no mechanism exists whereby an owner of mineral rights can file a return in order to pay taxes on the mineral rights.[46] Accordingly, it is impossible to comply with the terms of the statute.

The Petition for Writ of Certiorari should be granted so that the statute will not continue to deprive owners of mineral rights of their property without due process. The

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[44] Pet. App. 48a.

[45] Pet. App. 29a, 42a-43a.

[46] Pet. App. 45a, 46a.

statute should be struck down as unconstitutional, and the judgment of the Supreme Court of Georgia reversed.

Respectfully submitted,

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*Denotes counsel of record.

APPENDIX A

In the Supreme Court of Georgia

Decided: MAR 15, 1993

S92A1223. FISCH v. RANDALL MILL CORPORATION.

FLETCHER, Justice.

This appeal concerns whether the phrase "worked" or "attempted to work the mineral rights" in the state mineral lapse statute is unconstitutionally vague under the Georgia or Federal Constitutions. We hold that the statute is not vague and affirm the trial court's order that Randall Mill Corporation has gained absolute title to the disputed mineral rights.

Randall Mill purchased property in North Fulton County in 1989 and filed a petition for declaratory judgment under OCGA § 44-5-168. The petition alleged that no one worked or attempted to work the mineral rights in the property or paid taxes on them for the past seven years. Fisch, who claims an unspecified interest in the mineral rights as a descendant of the 1850 owner of the property, contends that he attempted to work the minerals by walking the property and collecting 10 to 12 rock samples for analysis and that he had made several trips to the courthouse to try to pay taxes. The trial court denied Fisch's motion for summary judgment, granted Randall Mill's motion for summary judgment, and declared that Fisch has lost all mineral rights in the property. Fisch appeals.

1. The mineral lapse statute provides:

(a) Whenever mineral rights are conveyed or whenever real property is conveyed in fee

> simple but the mineral rights to such property are reserved by the grantor, the owner of the real property in fee simple or his heirs or assigns may gain title to such mineral rights by adverse possession if the owner of the mineral rights or his heirs or assigns have *neither worked nor attempted to work the mineral rights* nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition provided for in subsection (b) of this Code section.

OCGA § 44-5-168 (a). (Emphasis Supplied.) "[U]nder this statute the owner of the mineral rights loses them by nonuse plus nonpayment of taxes, as opposed to losing such rights by adverse possession of the fee simple owner."[1] *Hinson v. Loper,* 251 Ga. 239, 240 (304 SE2d 722) (1983). The statute's purpose is "to encourage the use of the state's mineral resources and the collection of taxes, or to encourage the use of land free of interference by the holders of mineral rights who neither use nor pay taxes upon them." *Hayes v. Howell,* 251 Ga. 580, 585 (308 SE2d 170) (1983). We have previously upheld the statute against challenges that it violated the state constitutional prohibitions against the impairment of the obligation of contracts, the passage of retroactive laws, and the uncompensated taking of property. See *Hayes,* 251 Ga. at 583-85;

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[1] The previous rule provided that nonuse would not cause loss of title to the minerals. "Neither will [title] be lost by prescription, where there is no adverse user of the minerals themselves, as distinguished from the surface." *Brooke v. Dellinger,* 193 Ga. 66, 73 (17 SE2d 178) (1941).

Georgia Marble Co. v. Whitlock, 260 Ga. 350, 355 (392 SE2d 881) (1990), cert. denied, 111 SC 675 (1991).

Fisch argues that the statute violates the due process clause of the Georgia and United States Constitutions because the phrase "worked [or] attempted to work the mineral rights" provides no standard for the owner of mineral rights to protect his or her interest. When a statute "is so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law." *Anderson v. Little & Davenport Funeral Home*, 242 Ga. 751, 752 (251 SE2d 250) (1978) (quoting *City of Atlanta v. Southern R. Co.*, 213 Ga. 736, 738 (101 SE2d 707) (1958)).

The words "work," "attempt to work," and "mineral rights" are words in general use that must be given their ordinary meaning in interpreting the statute. See OCGA § 1-3-1; 54 AmJur2d *Minerals* § 6 (1971). Consistent with the evil that the General Assembly sought to remedy, we have construed "worked or attempted to work" to mean "use." See *Georgia Marble*, 260 Ga. at 355; *Hayes*, 251 Ga. at 583; *Hinson*, 251 Ga. at 240. This meaning comports with the definition of work as "to cause to operate or produce" and "to carry on an operation." *Webster's Third New Int'l Dictionary* 2634 (1961). The term "mineral rights" is defined as "the right to explore for and extract [specified] minerals" in a given tract of land. Id. at 1438. To meet the statutory requirement of working or attempting to work mineral rights, the owner of the mineral interests must carry on an operation to explore for, use, produce, or extract minerals in the land. The statute is not so uncertain in its meaning that persons of common intelligence

must guess at its interpretation and differ on its application.

2. Fisch's acts do not constitute, as a matter of law, working or attempting to work his mineral rights. Fisch contends that he has worked his mineral interests by selling his mineral rights in one lot, regularly visiting the property, collecting rock samples for testing, obtaining assay reports of minerals indigenous to the area, studying geological maps, and attempting to locate other heirs. Adopting his interpretation of work as "any physical or mental exertion" would undermine the statute's purpose because any effort, however unrelated to the exploration and production of minerals, would constitute working the mineral rights. The owner of a mineral interest must do more than conduct genealogical research and pick up rock samples to meet the statutory requirement of working or attempting to work the mineral rights.

3. Similarly, Fisch's payment of taxes after Randall Mill filed this action and his previous unsuccessful attempts to pay taxes do not satisfy the statutory requirement. See *Larkin v. Laster*, 254 Ga. 716, 718 (334 SE2d 158) (1985). If, as Fisch contends, the tax commissioner failed to assess ad valorem taxes on his interest in the mineral rights, Fisch should have filed a writ of mandamus to compel the commissioner to act. See OCGA § 9-6-20; *Dennington v. Mayor and Council of Roberta*, 130 Ga. 494 (61 SE 20) (1908) (holding mandamus was appropriate remedy to compel the levy and collection of school taxes). Yet, Fisch neither paid taxes nor sought a writ of mandamus during the seven years prior to Randall Mill's filing of this action.

4. The remaining enumerations of error are without merit.

Judgment affirmed. Clarke, C.J., Benham, Sears-Collins and Hunstein, JJ., and Judge Frank C. Mills, concur; Hunt, P.J., concurs in judgment only.

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

RANDALL MILL CORPORATION,	:	CIVIL ACTION FILE NO. D-73545
Plaintiff,	:	
-vs-	:	
THE HEIRS OF P.H. RANDAL(L), ET AL.,	:	
Defendants.	:	

ORDER

The within and foregoing Motion for Summary Judgment having been brought before this Court by Plaintiff, Randall Mill Corporation, and after hearing argument of counsel and reviewing all appropriate materials,

IT IS HEREBY CONSIDERED, ORDERED, and ADJUDGED that the aforesaid Motion be and the same is hereby granted. Pursuant to O.C.G.A. §44-5-168, Defendants have lost all mineral rights in the property at issue in this case and the Plaintiff has gained absolute title to such rights.

AND IT IS SO ORDERED, this 28 day of Jan, 1992.

/s/ Luther Alverson
Luther Alverson
Judge, Fulton Superior Court
Atlanta Judicial Circuit

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

RANDALL MILL CORPORATION,	:	CIVIL ACTION FILE NO. D-73545
Plaintiff,	:	
-vs-	:	
THE HEIRS OF P.H. RANDAL(L), ET AL.,	:	
Defendants.	:	

ORDER

The within and foregoing Motion for Summary Judgment having been brought before this Court by Defendant, Howard W. Fisch, Jr., and after hearing argument of counsel and reviewing all appropriate materials,

IT IS HEREBY CONSIDERED, ORDERED, and ADJUDGED that the aforesaid Motion be and the same is hereby denied.

AND IT IS SO ORDERED, this 28 day of Jan, 1992.

/s/ Luther Alverson
Luther Alverson
Judge, Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX C

STATE OF GEORGIA

COUNTY OF FULTON

Fulton County, Georgia
Real Estate Transfer Tax
Paid $5,000.00
Date 10-19-89
JUANITA HICKS
Clerk, Superior Court
By: /s/ Illegible
Deputy Clerk

GEORGIA Fulton County Clerk's Office Superior Court
Filed & Recorded, Oct. 19, 1989 at 9:47
/s/ Juanita Hicks
CLERK

EXECUTOR'S DEED

THIS INDENTURE Is made as of October 18, 1989; between BATES BLOCK AND JOHN HAYS MERSHON, AS EXECUTORS OF THE ESTATE OF ELEANOR McDONALD STORZA (hereinafter referred to as "Grantor") (Eleanor M. Storza, late of Fulton County, Georgia hereinafter referred to as the "Deceased") and Randall Mill Corporation, a Georgia corporation (hereinafter referred to as "Grantee") ("Grantor" and "Grantee" to include their respective heirs, successors, executors, administrators, legal representatives and assigns where the context requires or permits).

WITNESSETH:

GRANTOR acting under and by virtue of the power and authority contained in Items Nine and Ten of the Last Will and Testament of the Deceased dated March 9, 1987, such having been probated in the Court of Probate of Fulton County, Georgia and for which Letters Testamentary were issued on February 24, 1989 and recorded in Letters Testamentary Book 119, beginning at Page 214, Records of Fulton County, Georgia, for and in consideration of the sum of FIVE MILLION AND NO/100THS DOLLARS ($5,000,000.00 in hand paid at and before the sealing and delivery of these presents (the receipt of which is hereby acknowledged), has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto Grantee, all that tract or parcel of land lying and being in Land Lots 179 and 180 of the 17th District of Fulton County, Georgia (hereinafter referred to as the "Land"), as more particularly described in *Exhibit "A"* attached hereto and by reference made a part hereof, subject to the restrictions, prohibitions, conditions and covenants set forth in the next paragraph below and those matters more particularly described on *Exhibit "B"* attached hereto and by reference made a part hereof.

The Land and the conveyance of the Land is subject to the following restrictions, prohibitions, conditions and covenants:

Grantor reserves and retains all right, title, privilege and interest in and to the use of the names "Storza", "Moccasin Hollow" and "Moccasin Hollow Farm(s)" (or any variations thereof) (hereinafter collectively referred

to as the "Retained Names") and Grantor shall forever hereafter enjoy the right to the exclusive use of the Retained Names and the right to use the Retained Names (now or at anytime in the future) shall not be conveyed with the Land. Use of the Retained Names in connection with the Property for any purpose, business or otherwise (now or at any time in the future) or selling, transferring, licensing or otherwise conveying or assigning the Retained Names to any person or entity without the prior written consent of Grantor (or the successors or assigns of Grantor) is expressly prohibited and any sale, assignment, transfer, conveyance, lease or other disposition of the Land shall be subject to the same prohibition and restriction. Posting any signs suggesting that the Land (or any portion thereof) may be referred to by any of the Retained Names is expressly prohibited and Grantee shall be responsible to use its reasonable good faith efforts to prevent its employees, agents or representatives from verbally using or referring to the Land (or any portion thereof) by any of the Retained Names and shall refrain from using the Retained Names on any signs, labels, advertising or other printed or promotional materials or in connection with any leases or licensing agreements. All deeds from Grantee conveying all or any portion of the Land shall contain a reference to the restrictions, prohibitions and obligations contained herein, and such deeds from Grantee shall provide that all deeds from all grantees of Grantee (and their successors and assigns) shall also contain such a reference for the term of the restriction. A violation of the restrictions, prohibitions and obligations as contained herein shall entitle Grantor (or the successors or assigns of Grantor) to injunctive

relief and/or monetary damages provided that a violation of such restrictions, prohibition and obligations shall not result in a reversion or forfeiture of title to the Land, or any portion thereof or any interest therein. The prohibition and restriction of the use of the Retained Names in connection with the Land as contained herein shall run with the land and survive until October 18, 2009.

TO HAVE AND TO HOLD the Land with all and singular the rights, members and appurtenances thereof, to the same being, belonging, or in anywise appertaining, to the only proper use, benefit and behoof of Grantee forever, in as full and ample a manner as the same was held, possessed and enjoyed, or might have been held, possessed and enjoyed, by the Decreased except as otherwise contained herein.

EXECUTED under seal as of the date above.

Signed, sealed and delivered in the presence of:

/s/ Illegible
Unofficial Witness

/s/ Elizabeth W. MacNeil
Notary Public

GRANTOR:

By: Bates Block (SEAL)
BATES BLOCK AS
EXECUTOR OF
THE ESTATE OF
ELEANOR McDONALD
STORZA

Commission Expiration Date:

(NOTARIAL SEAL)

Elizabeth W. MacNeil
Notary Public, Cobb County, Georgia
My Commission Expires October 7, 1990.

Signed, sealed and delivered in the presence of:

/s/ Illegible
Unofficial Witness

/s/ Elizabeth W. McNeil
Notary Public

GRANTOR:

By: /s/ John Hays Mershon (SEAL)
JOHN HAYS MERSHON AS EXECUTOR OF THE ESTATE OF ELEANOR McDONALD STORZA

Commission Expiration Date:

(NOTARIAL SEAL)

Elizabeth W. MacNeil
Notary Public, Cobb County, Georgia
My Commission Expires October 7, 1990.

Legal Description

PORTIONS OF ALL OF THAT PROPERTY set apart for Eleanor McDonald Elsas and described as "House and 65 Acres of Land and Buildings thereon Land Lot 179 and 180 located on Randall Mill Road, N.W., Fulton County, Ga." in that certain Order for Years Support dated February 7, 1952 concerning the Estate of William R. Elsas, Deceased, recorded in Years Support Book Q at pages 389 through 394, Records of Fulton County, Georgia, which property was the subject of those certain surveys: (i) Survey for Ticor Title Insurance Company and Randall Mill Corporation bearing the seal and certification of

Charles W. Worthy, Georgia Registered Land Surveyor No. 1560, dated May 18, 1989, last revised October 13, 1989 (the "Randall Mill Survey") and (ii) Survey for Ticor Title Insurance Company and Randall Mill Corporation bearing the seal and certification of Charles W. Worthy, Georgia Registered Land Surveyor No. 1560, dated March 8, 1982, updated October 5, 1989 and last revised October 12, 1989 (the "Buckingham Survey"), such portions being described therefrom as follows:

TRACT 1 (Randall Mill Road Property):

ALL THAT TRACT OR PARCEL OF LAND lying and being in Land Lots 179 and 180 of the 17th District, Fulton County, Georgia and being more particularly described as follows:

BEGINNING at an iron pin found on the southerly right-of-way line of West Conway Drive (a 45-foot right-of-way), which iron pin is located at the intersection of said southerly right-of-way line and the easterly land lot line of Land Lot 179 aforesaid district and county (being the westerly land lot line of Land Lot 160), thence leaving said southerly right-of-way line and running along said common land lot line south 02 degree 59 minutes 18 seconds east a distance of 918.0 feet to a point on the centerline of Nancy Creek (hereinafter referred to as "Point A"); run thence in a generally northwesterly, westerly, southwesterly and westerly direction along the centerline of said creek and following the meanderings thereof, a distance of 2840 feet to a point in the easterly right-of-way line of Randall Mill Road (a 40-foot right-of-way) (hereinafter referred to as "Point B") (the aforesaid Point A and Point B being connected by traverse lines

commencing at Point A and terminating at Point B as follows: North 47 degrees 52 minutes 21 seconds west 133.37 feet to a point; north 60 degrees 08 minutes 28 seconds west 311.33 feet to a point; south 70 degrees 54 minutes 50 seconds west 834.90 feet to a point; south 39 degrees 43 minutes 21 seconds west 707.28 feet to a point; south 56 degrees 03 minutes 03 seconds west 490.64 feet to a point; north 84 degrees 01 minutes 09 seconds west 345.34 feet to said Point B); run thence along the easterly right-of-way line of Randall Mill Road north 16 degrees 38 minutes 27 seconds west a distance of 306.92 feet to a point; run thence along said right-of-way line along the arc of a curve to the right (said arc being subtended by a chord bearing north 06 degrees 39 minutes 40 seconds west, 83.15 feet in length) an arc distance of 83.56 feet to a point; run thence along said right-of-way line north 03 degrees 13 minutes 46 seconds east a distance of 272.63 feet to a point; run thence in a northwesterly direction along said right-of-way line along the arc of a curve to the left (said arc being subtended by a chord bearing north 10 degrees 33 minutes 04 seconds west, 321.43 feet in length) an arc distance of 324.70 feet to an iron pin found; thence leaving said right-of-way line run north 89 degrees 54 minutes 46 seconds east a distance of 358.97 feet to an iron pin found; run thence north 01 degree 19 minutes 02 seconds west a distance of 782.71 feet to an iron pin found on the southerly right-of-way line of West Conway Drive; run thence along the southerly right-of-way line of West Conway Drive the following courses and distances: South 60 degrees 02 minutes 35 seconds east a distance of 97.05 feet to a point; in a southeasterly direction along the arc of a curve to the left (said arc

being subtended by a chord bearing south 68 degrees 34 minutes 18 seconds east, 85.81 feet in length) an arc distance of 86.12 feet to a point; south 77 degrees 01 minute 17 seconds east a distance of 233.20 feet to a point; in a northeasterly direction along the arc of a curve to the left (said arc being subtended by a chord bearing north 86 degrees 11 minutes 29 seconds east 377.63 feet in length) an arc distance of 383.09 feet to a point; north 69 degrees 24 minutes 16 seconds east a distance of 123.16 feet to a point; in a northeasterly direction along the arc of curve to the right (said arc being subtended by a chord bearing north 80 degrees 53 minutes 31 seconds east, 325.71 feet in length) an arc distance of 327.90 feet to a point; in a southeasterly direction along the arc of a curve to the right (said arc being subtended by a chord bearing south 84 degrees 29 minutes 33 seconds east, 153.29 feet in length) an arc distance of 153.37 feet to a point; southeasterly along the arc of a curve to the right (said arc being subtended by a chord bearing south 79 degrees 34 minutes 18 seconds east, 270.77 feet in length) an arc distance of 270.81 feet to a point; in a southeasterly direction along the arc of a curve to the left (said arc being subtended by a chord bearing south 88 degrees 47 minutes 27 seconds east, 150.13 feet in length) an arc distance of 151.06 feet to a point; north 80 degrees 11 minutes 51 seconds east a distance of 343.73 feet to an iron pin found and the POINT OF BEGINNING.

Said property containing 58.0 acres as shown on the Randall Mill Survey.

TRACT 2 (Buckingham Circle Property):

ALL THAT TRACT OR PARCEL OF LAND lying and being in Land Lot 180 of the 17th District, Fulton County, Georgia and being more particularly described as follows:

BEGINNING at an iron pin set on the northwesterly right-of-way line of Buckingham Circle, said iron pin being located 700 feet northeasterly of the intersection of the northeasterly right-of-way line of Randall Mill Road and the northwesterly right-of-way line of Buckingham Circle, thence leaving said northwesterly right-of-way line of Buckingham Circle run north 38 degrees 32 minutes 53 seconds west a distance of 405.3 feet, more or less, to the centerline of Nancy Creek; run thence in a generally northeasterly direction along the centerline of Nancy Creek and following the meanderings thereof, 75 feet, more or less, to a point; run thence south 46 degrees 58 minutes 03 seconds east a distance of 473 feet, more or less, to an iron pin found on the northwesterly right-of-way line of Buckingham Circle; run thence along said right-of-way line south 72 degrees 50 minutes 44 seconds west a distance of 150.11 feet to an iron pin set and the POINT OF BEGINNING.

Said property containing 1.036 acres as shown on the Buckingham Circle Survey.

EXHIBIT "B"

Permitted Exceptions

The following exceptions apply to both Tract 1 and Tract 2:

1. All City of Atlanta and State and County taxes for the year 1990 and subsequent years.

1. Riparian rights incident to the property.

The following exceptions apply only to Tract 1:

3. Rights of tenants, as tenants only, under the following:

   (a) Unrecorded Tenant lease by and among Laura J. Aronson, Helmer Realty Associates and Mrs. Francis Storza dated October 21, 1987.

   (b) Unrecorded Tenant Lease by and among Dianna E. Thorington, Helmer Realty Associates and Mrs. Francis Storza dated August 4, 1988.

   (c) Unrecorded Tenant Lease by and among Terry DeMeo, Helmer Realty Associates and Mrs. Francis Storza dated August 4, 1988.

   (d) Unrecorded Letter Agreement dated April 2, 1981 pursuant to which Henry G. Wood, Jr. is permitted is [sic] pasture horses.

4. Minerals and rights reserved in that certain Warranty Deed from P.H. Randall to Mrs. Neppie Clark, dated May 23, 1879, recorded on July 14, 1911 at Deed Book 311, page 318, Records of Fulton County, Georgia.

5. Easement from Mrs. Francis Storza formerly Eleanor McDonald Elsas to Georgia Power Company, dated June 15, 1953, recorded July 21, 1953 at Deed Book 2864, page 46, aforesaid Records.

6. Easement from Mrs. Francis Storza to Georgia Power company, dated April 21, 1959, recorded June 12, 1959 at Deed Book 3465, page 547, aforesaid Records.

7. Sanitary Sewer Easement from Eleanor McDonald Storza to City of Atlanta, dated September 19, 1961, recorded October 12, 1961 at Deed Book 3784, page 91, aforesaid Records.

8. Sanitary Sewer Easement from Eleanor McDonald Storza to City of Atlanta, dated August 19, 1971, recorded September 20, 1971 at Deed Book 5458, page 372, aforesaid Records.

9. Sanitary Sewer Easement from Eleanor McDonald Storza to City of Atlanta, dated April 23, 1973, recorded May 16, 1973 at Deed Book 5821, page 84, aforesaid Records.

10. All matters disclosed on that certain survey for Ticor Title Insurance Company and Randall Mill Corporation prepared by Charles W. Worthy, G.R.L.S. No. 1560, dated May 18, 1989, last revised October 13, 1989 including, without limitation, the following:

    (a) garage and asphalt drive encroaching along the west line of the subject property;

    (b) southern and eastern portion of the subject property within the 100 year Flood Hazard Area; and

    (c) centerline of Nancy Creek is the southern line of the subject property.

The following exceptions apply only to Tract 2:

11. Recorded plat at Plat Book 30, page 10, Records of Fulton County, Georgia, shows the following:

    (i) 60-foot front building line along Buckingham Circle;

(ii) Sanitary sewer pipe across the subject property; and

(iii) Note establishing 15-foot side building line.

12. Water rights and right-of-way referred to in that certain warranty Deed from T.R. Holcombe to Hugh Richardson, dated December 30, 1922 recorded January 9, 1923 at Deed Book 720, page 182, aforesaid Records.

13. Sewer Easement from Hugh Richardsen to City of Atlanta, dated September 11, 1936, recorded October 17, 1936 at Deed Book 1622, page 277, aforesaid Records.

14. Sewer Easement from Eleanor McDonald Storza to City of Atlanta, dated September 19, 1961, recorded October 12, 1961 at Deed Book 3784, page 92, aforesaid Records.

15. Pay as you enter sewer available to the Property.

16. All matters disclosed on that certain survey for Ticor Title Insurance Company and Randall Mill Corporation prepared by Charles W. Worthy, Georgia Registered Land Surveyor No. 1560, dated March 8, 1982, updated October 5, 1989, last revised October 12, 1989.

APPENDIX D

IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA

RANDALL MILL CORPORATION,	)	CIVIL ACTION
Plaintiff,	)	FILE NO. D73545
vs.	)	
THE HEIRS OF P. H. RANDAL(L), et al.,	)	
Defendants.	)	

Deposition of THOMAS J. CRAWFORD, taken on behalf of the Plaintiff, pursuant to agreement of counsel, in accordance with the Georgia Civil Practice Act, before Penny J. McPherson, Certified Court Reporter and Notary Public, at 460 East Paces Ferry Road, Atlanta, Georgia, on the 11th day of September 1990, commencing at the hour of 2:00 p.m.

* * *

[p. 139] By Mr. Hollis:

Q. Let me ask you to assume that Howard Fisch walked around the property south of Conway Road where you went on January the 9th and he says that he picked up rocks which he has identified as vein quartz and threw them in the trunk of his car; in your opinion does that activity of Howard Fisch constitute working the mineral rights on that property?

A. I will say yes and qualify it, not an unqualified yes. I will not say an unqualified yes. Yes, qualifying that he had enough interest for some reason to be concerned about what was on his property and was making an attempt to determine what was there.

Q. Do you have in mind the question that I just asked you?

A. Yes.

Q. Let me ask you the same question whether [p. 140] in your opinion that would constitute attempting to work the mineral rights.

A. Well, yes, he's attempting to gain more information about his property, about the minerals and rocks that are there.

Q. So is it your testimony that working of mineral rights is simply an information-gathering process?

A. Yes.

Q. And it has nothing to do whatsoever with any actual mining activity?

A. Not per se. Now, you may be taking samples but not the actual mining process, no.

* * *

[p. 144] By Mr. Hollis:

Q. It is your testimony, with a qualified yes, that if Howard Fisch walked around the property and picked up vein quartz and threw it in the trunk of his car, with a

qualified yes, he was working the mineral rights; that's what you said, right?

A. Okay, right.

* * *

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RANDALL MILL CORPORATION	)	
Plaintiff,	)	Civil Action
	)	File No. D73545
v.	)	
THE HEIRS OF P. H. RANDAL(L), *et al.*	)	
Defendants.	)	

AFFIDAVIT

Personally appeared before the undersigned attesting officer, duly authorized by law to administer oaths, Howard W. Fisch, Jr., who, upon being duly sworn, deposes and says:

1.

My name is Howard W. Fisch, Jr., and I currently reside at 3227-I, Post Woods Drive, Atlanta, Fulton County, Georgia, and I am competent to testify to the matters contained herein, and I am testifying from my own personal knowledge.

2.

I have been aware since I was a small child that my family, through my maternal ancestors, had owned extensive mineral rights in Fulton, DeKalb, and Cobb Counties principally through my ancestors Hardy Pace and P. H. Randall, and I had extensively researched my family history and attempted to locate my relatives who were also

descendants of Hardy Pace and/or P. H. Randall, who would share in pursuing with me the task of locating all the rightful co-owners, and assist in the necessary voluminous research task, and in also participating in the expense required in locating any valuable minerals, and their sale or license, exploration, mining, prospecting, obtaining mineral samples and assay reports, and possible development and exploitation of such mineral rights. Prior to 1975, I was aware that Hardy Pace had on April 20, 1850 conveyed by deed, title to all of Land Lot No. 179, except approximately two (2) acres, reserving to himself the mineral rights thereon, together with other Land Lots, to P. H. Randall, and I was aware of a deed from P. H. Randall dated May 23, 1879 deeding to my ancestor Mrs. Neppie Clark title to certain land in Land Lot No. 179 and No. 180 (including the subject land) reserving the mineral rights to himself. I had not found any other deeds that to my knowledge revoked the general reservation of these extensive valuable mineral rights unto Hardy Pace and P. H. Randall and their heirs.

[No paragraph 3 in original]

4.

I have testified extensively in my depositions in this action and in a previous action involving such mineral rights, styled: *Trust Company Bank, et al. v. The Heirs of P. H. Randall, et al.*, Civil Action File No. C-93927 in the Superior Court of Fulton County. I have been on the subject property many times in the past from my childhood to the present, and within the seven (7) years prior to the institution of Plaintiff's suit, and I have collected rock samples from the property. I have also obtained from the State Department of Natural Resources assay reports of the gold and other minerals indigenous to the area,

and studied geological maps of the general vicinity in search of the exact location of the gold.

5.

I conducted some of these activities in conjunction with my cousin, Frederick Schoeck, who has shared some of my interest in these minerals, and he has assisted me in attempting to locate the other heirs/co-owners involved and in attempting to determine the location and value of these minerals and the best ways in which they could be exploited and developed for my benefit.

6.

I was not aware of or familiar with the provisions of O.C.G.A. § 44-5-168, which became effective July 1, 1975, relating to mineral rights, until early in the year 1982 prior to the *Trust Company* action above described being filed. As a result of that action and my further research, I became familiar with the portion of said law relating to the right of an owner of said mineral rights, separate and apart from the fee simple owner of the surface rights, to preserve such rights by working or attempting to work the mineral interest or paying the ad valorem taxes thereon when due. There is not now, and has never been since the passage of said statewide law in 1975 in Fulton County, Georgia, any method or procedure whereby an owner of such mineral rights could file for and be assessed taxes for such mineral interest separate from the surface owner, nor to my knowledge is their any method in place to implement such law in Fulton County in that there is no standard or guidelines for evaluating the value of such interest for the purpose of assessing ad valorem taxes thereon.

7.

In January or February of 1982, I called the Fulton County Tax Commissioner's office on the telephone to inquire about the filing of the mineral interest I owned in Fulton County, Georgia, including the mineral rights that are the subject matter of this litigation, and I was told by the official in that office with whom I spoke that there was no procedure for the returning of such interest separate and part from the fee simple owner of the surface rights on said property, and that I therefore, would not be allowed to return such interest for ad valorem tax purposes in 1982 under their current enforcement and implementation of the law as to mineral rights.

8.

On or about April 15, 1983, I filed an Affidavit Affecting Title to Real Property (which included the subject property) a true and correct copy of which is attached to Defendant's Brief and made a part hereof.

9.

In the latter part of 1983, I settled my interest in the mineral rights involved in the above referred to *Trust Company* litigation.

10.

In 1984, I sold to Jill V. Childress certain mineral rights in and to certain property located in Land Lot No. 200 of the 17th District of Fulton County in furtherance of my claim to said mineral rights and in pursuit and defense of same.

11.

I have actively worked or attempted to work, discover, locate, trade in, sell, explore and exploit the mineral interest in the property in any way possible and to give notice to all the world that I intended to preserve, protect, and defend all such mineral interest to the best of my ability and resources. It was for this reason, and upon advice of counsel, that I filed the above reference Affidavit Affecting Title to Real Property in an effort to comply with the law and the intent as set forth in the United States Supreme Court decision in the case of *Texaco v. Short*, construing a similar law relating to mineral rights enacted by the State of Indiana.

12.

In January or February, 1989, I went personally to the office of the Fulton County Tax Commissioner to attempt to again return these mineral interest for ad valorem tax purposes and was referred at that time to Supervisor William McCurdy, who explained to me at that time that I still could not return this mineral interest for ad valorem tax purposes as there was no procedure in place for the returning of such interest separate and apart from the fee simple owner of the surface.

13.

I went back to the office of the Fulton County Tax Commissioner during the latter part of February, 1990, and again was referred to Supervisor Walter McCurdy, who later called me back and said that it had been determined that I should be allowed to return the mineral

interest I claimed separate and apart from the fee simple owner of the title.

14.

On March 1, 1990, I was allowed by Walter McCurdy to return for ad valorem tax purposes my ownership in mineral interests separate and apart from the surface ownership, as is shown on the copy of such return attached hereto, marked Exhibit "A," and by express reference made a part hereof. This was allowed and done at the express direction of Tax Commissioner, Frank Cox, after I had initially contacted Supervisor William McCurdy, who had discussed and cleared it with Tax Commissioner Frank Cox, that I should be allowed to return certain mineral interest in which I had an interest in located in Fulton County that I owned separate and apart from the fee simple owner of the surface. As it was explained to me by Supervisor Walter McCurdy, this was to his knowledge the first time that the Fulton County Tax Commissioner's office had allowed for the return and filing of such separate mineral interest.

15.

I was familiar with the policy of the previous Commissioner, William Lee Roberts, who would not allow such a return to be filed as there was no policy or procedure established by the Fulton County Commission for accepting the filing of, or assessment of the value of such interest.

16.

On March 1, 1990, I paid, and it was accepted on behalf of the Fulton County Tax Commissioner's office,

the sum of $15.00, representing $1.00 for each Land Lot filed upon as is fully listed on Exhibit "A".

17.

To my knowledge the Fulton County tax assessors took no action on said filing nor attempted to value or assess such interest, nor was any bill prepared and forwarded to me in July, 1990 at the time when ad valorem tax bills in Fulton County are sent out, or at any other time during 1990.

18.

I was not sent a notice or ad valorem tax bill for 1991, nor do I anticipate being assessed or billed for such interest for the tax year 1991, and there is still no method or procedure currently in place in Fulton County for the valuing and assessing such interest.

19.

I have worked or attempted to work the mineral interest as provided for in O.C.G.A. § 44-5-168.

20.

I have done all in my power to return and pay any taxes due on said mineral rights, but have been wrongfully prevented from doing so by reason of the inadequacies and inherent vagueness of the statute and the fact that Fulton County, the county in which said mineral rights are now and have always been located, have no proper policy or method of allowing for the return and reporting of mineral interest separate and apart from the fee simple surface rights.

FURTHER AFFIANT SAITH NOT.

This the 13th day of May, 1991.

/s/ Howard W. Fisch, Jr.
HOWARD W. FISCH, JR.

Sworn to and subscribed before me the undersigned Notary Public this the 13th day of May, 1991.

/s/ Rita A. Owen
Notary Public
My commission Expires February 7, 1994.

EXHIBIT "A"

DUPLICATE TAX RECEIPT
TAX COMMISSIONER'S OFFICE

1990

FULTON COUNTY

No. _____ $ 3^{00} Principal Tax; $ -- Interest & Fifa; $ -- Penalty; $ 8^{00} Total Mineral Rights.

Property Address 17-LL162,202,213; Atlanta, Ga., March 1 1990; Taxpayer Name Howard W. Fisch Jr, et al Three dollars and no/100 DOLLARS

[ ] City of Atlanta [✓] State and County – Tax for Year 1990.

William Lee Roberts, Tax Commissioner, Fulton County

Per /s/ David W. McCurdy

1990
TAX YEAR

CITY OF ATLANTA/FULTON CNTY
TAXPAYER'S REAL PROPERTY TAX RETURN –
TAXPAYER COPY
17-203,212,213,214,215,216
DIST LL/SHT SQUARE UNIT CK

TAXPAYER'S RETURN OF PROPERTY FOR TAXATION TO STATE OF GEORGIA, FULTON COUNTY AND CITY OF ATLANTA FOR TAX YEAR AS OF JANUARY 1st IN COMPLIANCE WITH THE LAWS OF SAID STATE 'WILLIAM LEE ROBERTS, TAX COMMISSIONER, FULTON COUNTY, GA'

TAX DIST; SCHOOL EXEMPTION; SANITARY; CITY EXEMPTION CODE AMOUNT; CITY'S FAIR MARKET VALUE LAND; CLASS; CITY'S FAIR MARKET VALUE BUILDINGS; CLASS; CITY'S FAIR MARKET VALUE OF LAND AND BUILDINGS.

LOT; BLOCK; COUNTY LOCAL EXEMPTION-1; COUNTY LOCAL EXEMPTION-2; COUNTY EXEMPTION CODE AMOUNT; COUNTY'S FAIR MARKET VALUE LAND; CLASS; COUNTY'S FAIR MARKET VALUE BUILDINGS; CLASS; COUNTY'S FAIR MARKET VALUE OF LAND AND BUILDINGS.

TAXPAYER'S FAIR MARKET VALUE OF LAND AND BUILDINGS.

LOCATION OF PROPERTY; ACRES; LOC. CODE.
MINERAL RIGHTS ONLY

TAXPAYER NAME AND ADDRESS
FISCH HOWARD W JR ET AL

1100 CIRCLE 75 PARKWAY, SUITE 320
ATLANTA, GA 30339

TAXPAYERS OATH

1 Georgia Levy OCGA Section 48-5-19. "I do solemnly swear that I have carefully read (or have heard read) and have duly considered the questions propounded in the foregoing tax list, and that the value placed by me on the property returned, as shown by said list, is the true market value thereof; and I further swear that I returned, for the purpose of being taxed thereon, every species of property that I own in my own right, or have control of, either as agent, executor, administrator, or otherwise: and that in making said return, for the purpose of being taxed thereon, I have not attempted, either by transferring my property to another or by any other means, to evade the laws governing taxation in the state I do further swear that in making said return I have done so by estimating the true worth and value of every species of property contained therein."

2 Georgia Levy OCGA Section 48-5-46. "I also solemnly swear that if a homestead exemption is claimed on this tax return, that the conditions of ownership and occupancy are the same as at the time the homestead exemption was last granted."

SIGN HERE /s/ Howard W. Fisch Jr.

Sworn to before me the 3-1-90

/s/ David W. McCurdy
TAX COMMISSIONER DEPUTY TAX COMMISSIONER,
NOTARY PUBLIC

DUPLICATE TAX RECEIPT
TAX COMMISSIONER'S OFFICE
FULTON COUNTY

1990

No. _____ $ 12^{00} Principal Tax; $ -- Interest & Fifa; $ -- Penalty; $ 12^{00} Total Mineral Rights.

Property Address 17-LL178, 179, 180, 200, 201, 202, 203, 212, 213, 214, 215, 216; Atlanta, Ga., March 1 1990; Taxpayer Name Howard W. Fisch Jr, et al Twelve dollars and no/100 DOLLARS

[✓] City of Atlanta [ ] State and County – Tax for Year 1990.

William Lee Roberts, Tax Commissioner, Fulton County

Per /s/ David W. McCurdy

1990
TAX YEAR

UNINCORPORATED FULTON CNTY
TAXPAYER'S REAL PROPERTY TAX RETURN –
TAXPAYER COPY
17- 162,202,213
DIST LL/SHT SQUARE UNIT CK

TAXPAYER'S RETURN OF PROPERTY FOR TAXATION TO STATE OF GEORGIA, FULTON COUNTY AND CITY OF ATLANTA FOR TAX YEAR AS OF JANUARY 1st IN COMPLIANCE WITH THE LAWS OF SAID STATE

"WILLIAM LEE ROBERTS, TAX COMMISSIONER, FULTON COUNTY, GA"

TAX DIST; SCHOOL EXEMPTION; SANITARY; CITY EXEMPTION CODE AMOUNT; CITY'S FAIR MARKET VALUE LAND; CLASS; CITY'S FAIR MARKET VALUE BUILDINGS; CLASS; CITY'S FAR MARKET VALUE OF LAND AND BUILDINGS.

LOT; BLOCK; COUNTY LOCAL EXEMPTION-1; COUNTY LOCAL EXEMPTION-2; COUNTY EXEMPTION CODE AMOUNT; COUNTY'S FAIR MARKET VALUE LAND; CLASS; COUNTY'S FAIR MARKET VALUE BUILDINGS; CLASS; COUNTY'S FAIR MARKET VALUE OF LAND AND BUILDINGS.

TAXPAYER'S FAIR MARKET VALUE OF LAND AND BUILDINGS.

LOCATION OF PROPERTY; ACRES; LOC. CODE.
MINERAL RIGHTS ONLY

TAXPAYER NAME AND ADDRESS
FISCH HOWARD W JR ET AL
1100 CIRCLE 75 PARKWAY, SUITE 320
ATLANTA, GA 30339

TAXPAYERS OATH

1 Georgia Levy OCGA Section 48-5-19. "I do solemnly swear that I have carefully read (or have heard read) and have duly considered the questions propounded in the foregoing tax list, and that the value placed by me on the property returned, as shown by said list, is the true market value thereof; and I further swear that I returned, for the purpose of being taxed thereon, every species of property that I own in my own right,

or have control of, either as agent, executor, administrator, or otherwise: and that in making said return, for the purpose of being taxed thereon, I have not attempted, either by transferring my property to another or by any other means, to evade the laws governing taxation in the state I do further swear that in making said return I have done so by estimating the true worth and value of every species of property contained therein."

2 Georgia Levy OCGA Section 48-5-46. "I also solemnly swear that if a homestead exemption is claimed on this tax return, that the conditions of ownership and occupancy are the same as at the time the homestead exemption was last granted."

SIGN HERE /s/ Howard W. Fisch Jr.

Sworn to before me the 3-1-90

/s/ David W. McCurdy
TAX COMMISSIONER DEPUTY TAX COMMISSIONER, NOTARY PUBLIC

1990
TAX YEAR

CITY OF ATLANTA/FULTON CNTY
TAXPAYER'S REAL PROPERTY TAX RETURN –
TAXPAYER COPY
17-178,179,180,200,201,202
DIST LL/SHT SQUARE UNIT CK

TAXPAYER'S RETURN OF PROPERTY FOR TAXATION TO STATE OF GEORGIA, FULTON COUNTY AND CITY OF ATLANTA FOR TAX YEAR AS OF JANUARY

1st IN COMPLIANCE WITH THE LAWS OF SAID STATE "WILLIAM LEE ROBERTS, TAX COMMISSIONER, FULTON COUNTY, GA"

TAX DIST; SCHOOL EXEMPTION; SANITARY; CITY EXEMPTION CODE AMOUNT; CITY'S FAIR MARKET VALUE LAND; CLASS; CITY'S FAIR MARKET VALUE BUILDINGS; CLASS; CITY'S FAR MARKET VALUE OF LAND AND BUILDINGS.

LOT; BLOCK; COUNTY LOCAL EXEMPTION-1; COUNTY LOCAL EXEMPTION-2; COUNTY EXEMPTION CODE AMOUNT; COUNTY'S FAIR MARKET VALUE LAND; CLASS; COUNTY'S FAIR MARKET VALUE BUILDINGS; CLASS; COUNTY'S FAIR MARKET VALUE OF LAND AND BUILDINGS.

TAXPAYER'S FAIR MARKET VALUE OF LAND AND BUILDINGS.

LOCATION OF PROPERTY; ACRES; LOC CODE
MINERAL RIGHTS ONLY

TAXPAYER NAME AND ADDRESS
FISCH HOWARD W JR ET AL
1100 CIRCLE 75 PARKWAY, SUITE 320
ATLANTA, GA 30339

TAXPAYERS OATH

1 Georgia Levy OCGA Section 48-5-19. "I do solemnly swear that I have carefully read) or have heard read) and have duly considered the questions propounded in the foregoing tax list, and that the value placed by me on the property returned, as shown by said list, is the true market value thereof; and I further swear that I returned, for the purpose of being taxed thereon,

every species of property that I own in my own right, or have control of, either as agent, executor, administrator, or otherwise; and that in making said return, for the purpose of being taxed thereon, I have not attempted, either by transferring my property to another or by any other means, to evade the laws governing taxation in the state I do further swear that in making said return I have done so by estimating the true worth and value of every species of property contained therein."

2 Georgia Levy OCGA Section 48-6-46. "I also solemnly swear that if a homestead exemption is claimed on this tax return, that the conditions of ownership and occupancy are the same as at the time the homestead exemption was last granted."

SIGN HERE /s/ Howard W. Fisch Jr.

Sworn to before me the 3-1-90

/s/ David W. McCurdy
TAX COMMISSIONER DEPUTY TAX COMMISSIONER, NOTARY PUBLIC

APPENDIX F

STATE OF GEORGIA

COUNTY OF FULTON

IN RE REAL PROPERTY: Land Lots
200, 214, 213, 215, 202, 203,
212, 216, 162, 201, 178, 179
Fulton County, Georgia

AFFIDAVIT AFFECTING TITLE TO REAL PROPERTY

GEORGIA, Fulton County, Clerk's Office Superior Court

(Filed & Recorded APR 15, 1983) at 9:24

Before me a notary public in a [sic] for the State of Georgia came HOWARD FISCH, JR. of Atlanta, Georgia, who being duly sworn deposes and says on oath that he and his cousin, Frederick Clark Schoeck of Dallas, Texas, are heirs to the mineral rights reserved by P. H. Randal in a deed recorded in Deeds #11524, now Fulton County, a deed recorded 368/522 #149885 Fulton County, and a deed 368/519 #159084 Fulton County, Georgia.

That this Deponent has been familiar with the history of the possession of the mineral rights of said property over a period of thirty (30) years and affirmatively states that he, HOWARD FISCH, JR. and his cousin, Frederick Clark Schoeck have worked or attempted to work said mineral rights within the immediate last seven (7) years in a manner contemplated by O.C.G.A. §44-5-168. To Deponent's knowledge, no other person or persons have exercised any mineral rights.

That this document is filed to show the Deponent is retaining his mineral interest in the aforedescribed lands

and they are not abandoned nor lost by adverse possession.

/s/ Howard W. Fisch, Jr.
HOWARD FISCH, JR.
Deponent

Sworn to and subscribed before me
this 4th day of April, 1983.

Richard L. Roble
Deming and Roble
5265 Jimmy Carter Blvd.
Suite 1494
Norcross, Georgia 30093
(404) 449-8711

/s/ Kenneth Hart
NOTARY PUBLIC
Notary Public, Georgia,
State at Large
My Commission Expires
June 3, 1985

STATE OF GEORGIA

COUNTY OF FULTON

IN RE REAL PROPERTY: 17th District, Land Lots 162, 178, 179, 180, 200, 201, 202, 203, 212, 213 214, 215, 216, Fulton County, Georgia

AFFIDAVIT AFFECTING TITLE TO REAL PROPERTY

GEORGIA, Fulton County Clerk's Office Superior Court

Filed and Recorded Apr. 3, 1990 at 10:13

/s/ Juanita Hicks, Clerk

Pursuant to O.C.G.A. Section 44-2-20, before me, a notary public in and for the State of Georgia, came HOWARD W. FISCH, JR. of Atlanta, Georgia, who being duly sworn deposes and says on oath that he is of legal age and is suffering under no legal disability, and that he is an heir of Hardy Pace and of P. H. Randal, and claims an interest in the mineral rights reserved by Hardy Pace and P. H. Randal(l) in the 17th District of Fulton County in the Land Lots referenced above, some of which are set out in a deed recorded in Deed Book D, page 252, a deed recorded as Deed #11524, a deed recorded in Deed Book 368, page 522 #159885, a deed recorded in Deed Book 318, page 26, and a deed recorded in Deed Book 368, page 519 (#159084), all in Fulton County, Georgia.

Deponent further states that the owners of said mineral rights are the heirs of Hardy Pace and/or P. H. Randal(l), except for portions owned (and excluded from the claim of Deponent) pursuant to an Order entered in Fulton County Superior Court, Civil Action File No. C-93927, in favor of Trust Company Bank and Alex P. Gaines, as Co-Trustees of a trust created by Charles A. Collier, and the interests held by Jill V. Childress recorded in Deed Book 9244, pages 52 and 53.

Deponent further states that he has been familiar with the history of the possession of the mineral rights of

said property over a period of thirty (30) years and affirmatively states that he, HOWARD W. FISCH, JR. has worked or attempted to work said mineral rights within the immediate last seven (7) years in a manner contemplated by O.C.G.A. Section 44-5-168. To Deponent's knowledge, no other person or persons except those found in the public records have exercised any dominion, control or rights in and to said mineral rights or otherwise possessed them adversely to Deponent. Deponent further states that he has filed and paid ad valorem taxes on said mineral rights for the year 1990.

Deponent further states that this document is filed to show the Deponent is retaining the mineral interest in the aforedescribed lands and that they are not abandoned nor lost by adverse possession.

/s/ Howard W. Fisch, Jr. [SEAL]
Howard W. Fisch, Jr.

/s/ Linda Gale Varney
Witness

Sworn to and subscribed before me (N.P. SEAL)
this 2nd day of April, 1990.

/s/ Rita A. Owen
Notary Public
My commission expires February 7, 1994.

APPENDIX G

IN THE SUPERIOR COURT FOR
THE COUNTY OF FULTON
STATE OF GEORGIA

RANDALL MILL CORPORATION, Plaintiff, vs. HOWARD FISCH, JR., and FREDERICK CLARK SCHOECK, et al., Defendants.	)	CIVIL ACTION FILE NO. D73545

Deposition of COMMISSIONER FRANK D. COX, taken on behalf of the Defendants, pursuant to agreement of counsel, in accordance with the Georgia Civil Practice Act, before Suzanne Beasley, Certified Court Reporter and Notary Public, at Fulton County Government Complex, 141 Pryor Street, Atlanta, Georgia, on the 25th day of June, 1991, commencing at the hour of 9:20 a.m.

* * *

[p. 12] By Mr. Stamps:

Q. To your knowledge, has Fulton County ever assessed any value of mineral interests in Fulton County?

A. Not that I know of. It hasn't been on the digest, no. As you're aware, we did process a return last year,

and this was forwarded to the Joint Board of Tax Assessors but has not returned to us with an assessment on it at this time.

Q. I assume that you're speaking of the return that Mr. Fisch filed?

A. Yes.

Q. Other than the returns that Mr. Fisch filed in 1990, to your knowledge has any other entity ever filed a return for mineral rights interest in Fulton County?

A. Not to my knowledge.

* * *

[p. 18] By Mr. Stamps:

Q. And as part of your duties as the Director of the Receiving and Collection Division, then as the Chief Deputy Tax Commissioner and now as the Tax Commissioner, is it one or has hit been one of your duties to review those digests and become familiar with them on an annual basis?

A. Yes, I review those digests.

Q. Have any of those digests since 1974 ever reflected any assessment or any valuation or any returns for mineral rights interests in Fulton County?

A. Not to my knowledge.

* * *

APPENDIX H

IN THE SUPERIOR COURT FOR
THE COUNTY OF FULTON
STATE OF GEORGIA

RANDALL MILL CORPORATION,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. D73545
HOWARD FISCH, JR., and FREDERICK CLARK SCHOECK, et. al.,	)	
Defendants.	)	

Deposition of DAVID WILLIAM MCCURDY, taken on behalf of the Defendants, pursuant to agreement of counsel, in accordance with the Georgia Civil Practice Act, before Suzanne Beasley, Certified Court Reporter and Notary Public, at Fulton County Government Complex, 141 Pryor Street, Atlanta, Georgia, on the 25th day of June, 1991, commencing at the hour of 11:10 a.m.

* * *

[p. 24] By Mr. Stamps:

Q. Since this matter has come up with Mr. Fisch, since March the 1st, 1990, has there been any attempt to in any way explain to or notify the individuals at the clerk's office who accept the returns from the public that there may be people wishing to file mineral rights tax returns and how they are to deal with them?

A. No, sir, but it obviously needs to be done in some manner.

Q. Why do you say that?

A. Because they may have a problem dealing with it.

[p. 25] Q. What do you think those problems might be?

A. Not knowing what to do.

Q. Why would that be?

A. Because of, normally, the tax clerk is familiar with what to do with real estate tax returns, and using the word "mineral rights" would not ring a bell. They wouldn't know what to do.

Q. So someone would say, "I want to file a mineral rights return," and they would say, "We don't know what you're talking about"?

A. Yes.

* * *

[p. 29] By Mr. Stamps:

Q. Is there a general policy how to handle mineral rights?

A. No, sir.

Q. Is there any kind of policy of the Commissioner's office regarding the collection of taxes on mineral rights?

A. No, sir. We don't get that involved with it. Whatever is produced by the tax assessors, we issue a bill for.

We don't get that involved. We can't produce a bill until the tax assessors do their part.

* * *

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Statute:

O.C.G.A. § 44-5-168. Adverse possession of mineral rights under certain conditions; procedure to obtain title.

(a) Whenever mineral rights are conveyed or whenever real property is conveyed in fee simple but the mineral rights to such property are reserved by the grantor, the owner of the real property in fee simple or his heirs or assigns may gain title to such mineral rights by adverse possession if the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition provided for in subsection (b) of this Code section.

(b) In order to obtain absolute title to mineral rights in the circumstances described in subsection (a) of this Code section:

> (1) The owner of the real property in fee simple or his heirs or assigns may file in the superior court for the county where the land is located a petition requesting relief in the nature of declaratory judgment. The petition:
>
> > (A) Shall contain all essential, required paragraphs, including jurisdiction;
> >
> > (B) Shall contain the name and last known address of the grantor of the property reserving the mineral rights and the names and last known addresses of his heirs or assigns or any other person known by

the plaintiff to have an interest in the mineral rights;

(C) Shall show:

(i) That the plaintiff or his predecessors in title were granted and obtained a deed for the property in question;

(ii) That the conveyance reserved mineral rights or that the plaintiff or his predecessors in title conveyed the mineral rights and reserved or retained the fee simple title to the real property; and

(iii) That, for a period of seven years preceding the filing of the petition after the conveyance, the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid taxes on them; and

(D) Shall include any and all prayers regarding the land that the plaintiff may desire. Specifically, the petition may pray that the court find that the plaintiff has obtained title to the mineral rights through adverse possession and that the plaintiff be granted title to the mineral rights;

(2) Upon a finding in the plaintiff's favor, the court shall issue a judgment and decree declaring that the mineral rights involved have been lost and that the plaintiff has gained absolute title to such mineral rights; and

(3) Service shall be perfected in the same manner as service on defendants in an in rem proceeding, including service by publication.

(c) Nothing in this Code section shall restrict the court from granting further plenary relief, whether legal or equitable; and the failure of the petition in the plaintiff's favor shall not affect the right of the plaintiff to any other relief, legal or equitable, to which he may be entitled.

(d) Any person named in the petition or any person having an interest in the mineral rights shall have the right to intervene in a case brought under this Code section.

(e) In order to maintain the status quo pending the adjudication of the questions or to preserve equitable rights, the court may grant injunctions and other interlocutory extraordinary relief.

(f) Nothing in this Code section shall apply to a lease for a specific number of years nor to an owner of mineral rights who has leased the mineral rights in writing to a licensed mining operator as defined in Part 3 of Article 2 of Chapter 4 of Title 12.

Supreme Court, U.S.
FILED
JUL 15 1993
OFFICE OF THE CLERK

(2)

No. 92-1977

In The

Supreme Court of the United States

October Term, 1993

HOWARD W. FISCH, JR., individually and on behalf of all Co-Defendants and Co-Tenants,

Petitioner,

vs.

RANDALL MILL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HOWELL HOLLIS, III
Counsel of Record

KENAN G. LOOMIS
R. KEITH WALTON
FREEMAN & HAWKINS

4000 One Peachtree Center
303 Peachtree Street, N.W.
Atlanta, Georgia 30308
(404) 641-7500

Attorneys for Respondent Randall Mill Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

The sole issue presented for review is whether the Georgia mineral interests lapse statute is so vague and indefinite as to be void under the Constitutions of the United States and Georgia where the statute at issue has been construed by the Georgia Supreme Court.

PARTIES TO THE PROCEEDING

Petitioner Howard W. Fisch, Jr.'s statement regarding the parties in this case is essentially correct. Additionally, pursuant to Rule 24(b) of the Rules of the United States Supreme Court, Respondent Randall Mill Corporation ("Randall Mill") states that only Howard W. Fisch, Jr. ("Fisch") filed a Notice of Appeal in the Georgia Supreme Court.

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For the reasons set forth herein, Randall Mill urges the Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The unanimous opinion of the Georgia Supreme Court is reported at 262 Ga. 861, 426 S.E.2d 883 (1993), and appears as Appendix A to the Petition for Writ of Certiorari. The Order of the Superior Court of Fulton County, Georgia, denying Fisch's Motion for Summary Judgment and granting Randall Mills' Motion for Summary Judgment, respectively dated January 28, 1991, appears as Appendix B to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

In October, 1989, Randall Mill purchased certain real property (the "Property"), known as Land Lots 179 and 180 in the City of Atlanta, Fulton County, Georgia. Shortly thereafter, Randall Mill brought an action pursuant to O.C.G.A. § 44-5-168 to extinguish any adverse claims to mineral rights (the "Mineral Rights") in the Property. (O.C.G.A. § 44-5-168 appears as *Appendix A* hereto) In two proceedings below, Fisch has claimed that he held an interest in the Mineral Rights and that those purported rights have not been defeated, as a matter of law, by Randall Mill. Based upon O.C.G.A. § 44-5-168(a), *inter alia*, the Superior Court of Fulton County, Georgia

(the "Trial Court") held that Randall Mill was entitled to judgment as a matter of law and thus holds absolute fee simple title to the Property.

On appeal, the Georgia Supreme Court unanimously affirmed the Trial Court's decision. The Georgia Supreme Court correctly determined that Fisch had no claim to the Mineral Rights because Fisch did not, as a matter of law, "work or attempt to work the mineral rights" within the meaning of O.C.G.A. § 44-5-168(a). The Georgia Supreme Court concluded that

> Fisch's acts do not constitute, as a matter of law, working or attempting to work his mineral rights. Fisch contends that he has worked his mineral interests by selling his mineral rights in one lot, regularly visiting the property, collecting rock samples for testing, obtaining assay reports of minerals indigenous to the area, studying geological maps, and attempting to locate other heirs. Adopting his interpretation of work as "any physical or mental exertion" would undermine the statute's purpose because any effort, however unrelated to the exploration and production of minerals, would constitute working the mineral rights. *The owner of a mineral interest must do more than conduct genealogical research and pick up rock samples to meet the statutory requirement of working or attempting to work mineral rights.*

Fisch, 262 Ga. 861, 862-863, 426 S.E.2d 883, 885. (emphasis added).

Additionally, the Georgia Supreme Court considered and expressly rejected Fisch's contention that O.C.G.A.

§ 44-5-168(a) is vague and indefinite and therefore violates the due process clause of the United States and Georgia Constitutions.

B. Factual Allegations.

This case was originally decided in the Superior Court of Fulton County, Georgia on cross motions for summary judgment filed by Randall Mill and Fisch pursuant to O.C.G.A. § 9-11-56. There are no factual issues in dispute. Randall Mill refers this Court to the Georgia Supreme Court's opinion in this case which contains a succinct statement of the facts.

REASONS FOR DENYING THE WRIT

Fisch has failed to demonstrate that O.C.G.A. § 44-5-168(a) (the "Statute") is unconstitutionally vague and indefinite. Assuming, for the sake of argument, that the Statute was vague and indefinite, such is no longer the case because the Georgia Supreme Court has cured any vagueness alleged by Fisch by interpreting the Statute. In addition, Fisch has failed to present any "special or important reasons" for the grant of certiorari and has failed to invoke any of the criteria specified in Supreme Court Rule 10.1: No "state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals"; and no "state court or United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court."

I. THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND INDEFINITE

The cardinal rule in interpreting the meaning of a word contained in a statute is to (i) ascertain the legislative intent and purpose behind the statute and (ii) give to it an interpretation which will effectuate the legislative intent. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed. 2d 222 (1972). The undisputed policy and intent behind the enactment of the Statute by the Georgia General Assembly is to encourage the *use* of mineral rights. *Hayes v. Howell*, 251 Ga. 580, 585, 308 S.E.2d 170, 176 (1983) (holding lapse statute valid condition to retention of mineral rights based on state's police power). In order to carry out this intent, "work", as contemplated by the Georgia General Assembly, has been held to mean affirmative acts on the part of the mineral rights claimant. *Mixon v. One Newco, Inc.*, 863 F.2d 846, 849 (11th Cir. 1989) (distinguishing lapse statute from traditional adverse possession statute).

Randall Mill denied that Fisch has, or has ever had, any title to the Mineral Rights. Thus the Trial Court could not have entered judgment in favor of Fisch on his Motion for Summary Judgment. However, assuming for the sake of argument that there was or has been a severance of some or all of the mineral rights from the Property, and that Fisch had title, in some amount, to the Mineral Rights, the Trial Court was correct in finding that Fisch had not "work[ed] or attempt[ed] to work his purported mineral rights" under Georgia law.

The Statute provides that mineral rights lapse if the claimant has "neither worked nor attempted to work the

mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven (7) years immediately preceding the filing of the Petition as provided in subsection (b) of the Code Section." O.C.G.A. § 44-5-168(a). Thus, the sole issue presented by the Petition for Writ of Certiorari is the application of the statutory phrase "work or attempt to work one's mineral rights" and whether persons of reasonable intelligence can ascertain the core meaning of that phrase.

The best and only definition of "work" in the context of the Statute is clearly to "cause to operate or produce". This definition was properly applied by both the Trial Court and the Georgia Supreme Court and is consistent with common usage.[1] Such a definition of "work" is the only one which is consistent with the legislative intent underlying the Statute of encouraging the *use* of mineral rights. Even the common usage of the word "work"

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[1] "Work", a transitive verb, is defined in its common usages as follows:
1: To bring to pass: EFFECT (work havoc) (work miracles) . . . **2A**: to fashion or create by expending labor or exertion upon: FORGE, SHAPE (work flint into tools); **B**: to make or decorate with needle work; **ESP**: EMBROIDER (the button holes of the dress were worked in contrasting color) (work a floral design in wool and silk on the shawl); **3A**: to prepare for use by stirring or kneading; **B**: to bring into a desired form by a gradual process of cutting, hammering, scraping, pressing, stretching (work cold steel); **4**: to set or keep in motion, operation or activity (work cattle in a roundup); **5**: cause to operate or produce (a pump worked by hand) (***work a quarry***) (work farmland). *Webster's Third New International Dictionary* (1981). (emphasis added)

would require a mineral rights claimant either to operate or produce minerals to prohibit his mineral rights from lapsing.

The only conceivable manner in which one can operate or produce minerals is to conduct actual mining activities. Simply put, "worked or attempted to work" means "use". Given the requirements that a mineral rights owner must exhibit affirmative acts and use his mineral rights, the Georgia General Assembly, in promulgating the Statute, intended that mining activities must be conducted to preserve these rights. The term "mining" has been uniformly defined as "an operation consisting of sinking shafts to the productive level, digging or blasting out the minerals, and elevating them to the surface for processing . . . " 54 Am.Jur.2d *Mines and Minerals*, § 5 (1971); *Cole v. Ralph*, 252 U.S. 286, 40 S.Ct 321, 64 L.Ed. 567 (1920) ("mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered"); *See also, e.g., Fremont Lumber Co. v. Starrell Petroleum Co.*, 228 Ore. 180, 364 P.2d 773 (1961) (analyzing lease provisions containing the term "mining" to distinguish from "prospecting").

Even if one assumes that the Statute was once vague and indefinite, such is no longer the case. A court may cure a statute's vagueness by statutory interpretation. *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982) (construing the certainty and definiteness of a state statute by reference to legislative intent). The Georgia Supreme Court's interpretation of the Statute has removed any vagueness alleged by Fisch. Accordingly,

this Court must accept the Georgia Supreme Court's construction for the purpose of determining the constitutionality of the Statute. *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 272, 60 S.Ct. 523, 525, 84 L.Ed. 744 (1940) (holding statute not impermissibly vague and indefinite in view of the construction placed thereon by the highest court of the state); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L.Ed.2d 822 (1971) ("It is solely with the province of state courts authoritatively to construe state legislation").

Thus, Fisch seeks now to circumvent well-established rules of interpretation that were employed by the Georgia Supreme Court to determine the certainty and definiteness of the Statute. The Georgia Supreme Court has conclusively interpreted the Statute and recognized that the determining factor in applying the Statute is that "worked or attempted to work" requires that a claimant of mineral rights must *use* minerals in the land:

> The term "mineral rights" is defined as "the right to explore for and extract [specified] minerals" in a given tract of land. (cite). To meet the statutory requirement of working or attempting to work mineral rights, the owner of mineral interests must carry on an operation to explore for, use, produce, or extract minerals in the land. The statute is not so uncertain in its meaning that persons of common intelligence must guess at its interpretation and differ on its application.

Fisch, 262 Ga. 861, 862, 426 S.E.2d 883, 885.

The United States Constitution tolerates a greater degree of vagueness in civil statutes. *High Ol' Times, Inc.*

v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982) (holding Georgia "head shop" laws not void for vagueness). When a non-penal statute is before the Court, the court "must be lenient in evaluating its constitutionality." *State Farm Mut. Auto Ins. Co. v. Bates*, 542 F. Supp. 807, 825 (N.D. Ga. 1982) (*citing*, *Exxon Corporation v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981), *cert. denied*, 454 U.S. 932, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981)); *Anderson v. Little & Davenport Funeral Home, Inc.*, 242 Ga. 751, 752, 251 S.E.2d 250, 251 (1978) ("[a]lthough a statute does not undertake to define each of the words contained therein, this will not automatically render the statute vague, indefinite or uncertain in meaning"). Thus, a civil statute will be upheld by courts as certain and definite "if persons of reasonable intelligence can derive a core meaning from [the] statute." *Cotton States Mut. Inc. Co. v. Anderson*, 749 F.2d 663, 669 (11th Cir. 1984) (upholding the certainty and definiteness of the Georgia No-Fault Act).

There is no question but that persons of reasonable intelligence can ascertain a "core meaning" of the term "work or attempt to work" one's mineral rights by simply applying an ordinary signification to this language as is required under a vagueness analysis. The term "work or attempt to work" means the actual or attempted production of minerals through mining activity. The Statute is not void because the Georgia General Assembly did not specifically delineate what acts constitute "work or attempt to work" one's mineral rights. Likewise, Fisch's contention that *he* is uncertain as to the Statute's meaning does not render the Statute unconstitutional. *Bates*, 542 F. Supp. at 825 ("uncertainty in [a statute] is not enough for it to be unconstitutionally vague; rather, it must be

substantially incomprehensible"). Therefore, Fisch's argument that the statute is "void for vagueness" is without merit.

II. THIS CASE DOES NOT PRESENT A QUESTION OF FEDERAL LAW WHICH CONFLICTS WITH A DECISION OF EITHER ANOTHER STATE COURT OR OF A UNITED STATES COURT OF APPEALS

Fisch cannot cite any decisions that conflict with the Georgia Supreme Court's decision in *Fisch*. Instead, Fisch labors to fabricate a conflict between the precedent of this Court and the *Fisch* decision. His effort is disingenuous, at best, and unavailing. Specifically, Fisch asserts that "this Court held that a state has the power to condition permanent retention of property rights on performance of reasonable conditions that constitute minimal burdens to indicate a present intention to retain the interest." *Petition* at 12. Fisch proceeds to argue that *Fisch* conflicts with the precedent of this Court because "[c]ritical to the Court's decision in *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), was the fact that an owner could safeguard any mineral rights under the statute by the mere filing of a statement of claim in the county recorder's office at any time during a twenty-year period." *Id.*

Fisch's reliance upon *Texaco* is misplaced because Fisch ignores the obvious: this Court simply held in *Texaco* that requiring mineral rights owners to complete *any one* of the acts of use under the Indiana Mineral Lapse Statute was reasonable. Nowhere in that opinion did this Court state or infer that a mineral rights lapse statute

must provide for the filing of a notice of claim as a mechanism to preserve one's mineral rights.[2] Likewise, this Court did not state in *Texaco* that filing a notice of claim automatically preserves one's mineral rights regardless of whether the lapse statute under scrutiny lists such a filing as a mechanism by which mineral rights can be preserved. Nowhere in *Texaco* did this Court prohibit a state from requiring a claimant to work his mineral rights in order to preserve those rights.

Fisch has failed to cite a single decision rendered by this Court or any state supreme court which even hints at – let alone establishes – that mineral rights statutes must include the filing of a notice of claim as a mechanism to preserve one's mineral rights. Accordingly, Fisch's Petition for Writ of Certiorari is due to be denied.

III. THIS CASE DOES NOT PRESENT A QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The determination of whether a claimed interest in property is sufficient has long since been recognized as

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[2] The Georgia Supreme Court has already held that the mechanisms by which mineral rights can be preserved in Georgia under O.C.G.A § 44-5-168, satisfy this Court's analysis in *Texaco*. *Georgia Marble Company v. Whitlock*, 266 Ga. 350, 355, 392 S.E.2d 881, 885 (1990). The Georgia Supreme Court has also held that the Statute does not constitute an uncompensated taking of property. *Hayes v. Howell*, 251 Ga. 580, 583-85, 308 S.E.2d 170, 175-176 (1983).

the province of the several states.[3] *Scoggins v. Moore*, 579 F. Supp. 1320, 1325, *aff'd without opinion*, 747 F.2d 1466 (11th Cir. 1984) ("[t]o determine the sufficiency of a property interest, reference must be made to state law"); *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976). It is also axiomatic that this Court will not substitute its own interpretation of a state statute for that of the state's own courts. *Smiley v. Kansas*, 196 U.S. 447, 455, 25 S.Ct. 289, 290, 49 L.Ed. 546 (1905) (holding interpretation placed by the highest court of the state upon its statutes is conclusive for the United States Supreme Court); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-500, 61 S.Ct. 643, 644-645, 85 L.Ed. 971 (1941) ("The last word on the meaning of a state statute belongs to the State Supreme Court.") To require all states to include the filing of a notice of claim as a method for avoiding the effect of a mineral lapse statute is to ignore the foundations of jurisprudence respecting a state's authority to regulate the mineral rights within its boundaries.

Georgia is one of eight states that has some form of lapse statute that may terminate the rights of mineral interest owners.[4] These lapse statutes uniformly require

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[3] The Georgia Constitution specifically authorizes the General Assembly "to provide [by law for; (1)] restrictions upon land use in order to protect and preserve the natural resources, environment and vital areas of this state." (emphasis supplied) 1983 Georgia Const., Art. III, Sec. VI, Par. II (a)(1) (Georgia Constitution, Art. III, Sec. VI, Par. II (a)(1) appears as *Appendix B* hereto).

[4] The other states that have enacted mineral rights lapse statutes are: Louisiana (La. Rev. Stat. Ann. § 31-21); Indiana

the mineral interest claimant to work his mineral rights during a specified period of time in order to prevent the forfeiture of those rights. If the statutory level of activity is not met by the mineral interest claimant, the rights "lapse."

The Statute was enacted to encourage the collection of taxes as well as to clear title problems which may exist with mineral interests. *Hayes v. Howell*, 251 Ga. 580, 585, 308 S.E.2d 170, 176-177; *Larkin v. Laster*, 254 Ga. 716, 718, 334 S.E.2d 158, 160 (1985) (holding that failure to pay taxes caused claimants to lose alleged mineral interests). A central purpose behind the Georgia General Assembly's enactment of the Statute is the desire to eliminate title problems resulting from long held mineral interests that have not been worked for an extended period of time. Mineral rights claimants are not only encouraged to develop their interests, but also to permit the State to collect any due and owing property taxes from the mineral rights claimant. The Georgia Supreme Court, "consistent with the evil that the General Assembly sought to remedy" construed "worked or attempted to work" to mean "use". *Fisch*, 262 Ga. 861, 862 426 S.E.2d 883, 885.

Fisch has argued that his walking tour of the Property, picking up rocks thereon and conducting genealogical research is sufficient to preserve whatever mineral rights he may have had. However, the Statute requires a mineral rights claimant to undertake *affirmative acts* to

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(Ind. Code Ann. § 32-5-11-1); Michigan (Mich. Stat. Ann. § 544.291); Nebraska (Neb. Rev. Stat. § 57-228); North Dakota (N.D. Cent. Code § 38-18-1-02); South Dakota (S.D. Codified Laws Ann. § 43-30A-3); Wisconsin (Wis. Stat. Ann. § 706.057).

work those rights in order to protect them from being lost. *Mixon*, 863 F.2d at 849. At the most, Fisch has (perhaps) prospected for minerals, but he has not "worked" any mineral rights as a matter of law.

Fisch's stroll about the Property and reflection about the possibility that minerals may be found there does not rise to the level of activity required by the Statute. The legislative intent behind the Statute is to encourage the *use* of minerals. Fisch has not met this requirement. Instead, Fisch asks this Court to rule that an afternoon stroll or a casual thought about potential minerals can preserve one's mineral rights without the necessity of mining those minerals. Fisch's interpretation of the Statute would encourage clouds on title, rather than the use of minerals. This result is contrary to the Statute's purpose and will result in unnecessary interference with a state regulatory program. Adopting Fisch's interpretation of work as "any physical or mental exertion" would undermine Georgia's intent in enacting the Statute because any effect, no matter how unrelated to the exploration and production of minerals, would constitute working or attempting to work mineral rights. Accordingly, Fisch's Petition for Writ of Certiorari must be denied.

IV. FISCH FAILED TO RAISE THE ISSUE OF UNCONSTITUTIONAL TAKING OF PROPERTY IN THE LAST COURT PRIOR TO SUPREME COURT REVIEW

Fisch states that the question presented by this case, *inter alia*, includes "[w]hether the conditions imposed on

owners of mineral rights under Georgia's mineral rights lapse statute . . . *constitute an unconstitutional taking of property.*" (emphasis added). *Petition* at i. However, Fisch did not raise this issue for review in the Georgia Supreme Court.

Accordingly, Fisch did not preserve a specific federal point for review in the last court prior to this Petition as required by Supreme Court Rule 14.1(h). The issue of whether the Statute constitutes an unconstitutional taking of property is not properly before this Court. *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 1649 118 L.Ed.2d 280 (1992) (stating that this Court does not decide questions not raised in lower courts in order to maintain the integrety of the process of certiorari); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976) (*per curiam*) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

CONCLUSION

The Georgia Supreme Court's unanimous decision in this case comports with all decisions of this Court in the area of the question presented for review. Also, the Georgia Supreme Court has conclusively interpreted the

Statute. Therefore, Fisch has failed to advance any reason for the grant of certiorari. His Petition should be DENIED.

This 15th day of July, 1993.

Respectfully submitted,

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APPENDIX A

44-5-168. Adverse possession of mineral rights under certain conditions; procedure to obtain title.

(a) Whenever mineral rights are conveyed or whenever real property is conveyed in fee simple but the mineral rights to such property are reserved by the grantor, the owner of the real property in fee simple or his heirs or assigns may gain title to such mineral rights by adverse possession if the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition provided for in subsection (b) of this Code section.

(b) In order to obtain absolute title to mineral rights in the circumstances described in subsection (a) of this Code section:

(1) The owner of the real property in fee simple or his heirs or assigns may file in the superior court for the county where the land is located a petition requesting relief in the nature of declaratory judgment. The petition:

(A) Shall contain all essential, required paragraphs, including jurisdiction;

(B) Shall contain the name and last known address of the grantor of the property reserving the mineral rights and the names and last known addresses of his heirs or assigns or any other person known by the plaintiff to have an interest in the mineral rights;

(C) Shall show:

(i) That the plaintiff or his predecessors in title were granted and obtained a deed for the property in question;

(ii) That the conveyance reserved mineral rights or that the plaintiff or his predecessors in title conveyed the mineral rights and reserved or retained the fee simple title to the real property; and

(iii) That, for a period of seven years preceding the filing of the petition after the conveyance, the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid taxes on them; and

(D) Shall include any and all prayers regarding the land that the plaintiff may desire. Specifically, the petition may pray that the court find that the plaintiff has obtained title to the mineral rights through adverse possession and that the plaintiff be granted title to mineral rights;

(2) Upon a finding in the plaintiff's favor, the court shall issue a judgment and decree declaring that the mineral rights involved have been lost and that the plaintiff has gained absolute title to such mineral rights; and

(3) Service shall be perfected in the same manner as service on defendants in an in rem proceeding, including service by publication.

(c) Nothing in this Code section shall restrict the court from granting further plenary relief, whether legal or equitable; and the failure of the petition in the plaintiff's

favor shall not affect the right of the plaintiff to any other relief, legal or equitable, to which he may be entitled.

(d) Any person named in the petition or any person having an interest in the mineral rights shall have the right to intervene in a case brought under this Code section.

(e) In order to maintain the status quo pending the adjudication of the questions or to preserve equitable rights, the court may grant injunctions and other interlocutory extraordinary relief.

(f) Nothing in this Code section shall apply to a lease for a specific number of years nor to an owner of mineral rights who has leased the mineral rights in writing to a licensed mining operator as defined in Part 3 of Article 2 of Chapter 4 of Title 12. (Code 1933, § 85-407.1, enacted by Ga. L. 1975, p. 725, § 1; Ga. L. 1987, p. 3, § 44).

APPENDIX B

Art. 3, § 6, ¶ 2

Paragraph II. Specific powers.

(a) Without limitation of the powers granted under Paragraph 1, the General Assembly shall have the power to provide by law for:

(1) Restrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state.

(2) A militia and for the trial by courts-martial and nonjudicial punishment of its members, the discipline of whom, when not in federal service, shall be in accordance with law and the directives of the Governor acting as commander in chief.

(3) The participation by the state and political subdivisions and instrumentalities of the state in federal programs and the compliance with laws relating thereto, including but not limited to the powers, which may be exercised to the extent and in the manner necessary to effect such participation and compliance, to tax, to expend public money, to condemn property, and to zone property.

(4) The continuity of state and local governments in periods of emergency resulting from disasters caused by enemy attack including but not limited to the suspension of all constitutional legislative rules during such emergency.

(5) The participation by the state with any county, municipality, nonprofit organization, or any combination thereof in the operation of any of the facilities operated by such agencies for

the purpose of encouraging and promoting tourism in this state.

(6) The control and regulation of outdoor advertising devices adjacent to federal aid interstate and primary highways and for the acquisition of property or interest therein for such purposes and may exercise the powers of taxation and provide for the expenditure of public funds in connection therewith.

Supreme Court, U.S.
FILED
SEP 15 1993
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No. 92-1977

In The

Supreme Court of the United States

October Term, 1993

HOWARD W. FISCH, JR., INDIVIDUALLY AND ON BEHALF OF ALL CO-DEFENDANTS AND CO-TENANTS,

Petitioners,

vs.

RANDALL MILL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

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INTRODUCTION

In its brief in opposition to Fisch's Petition for Writ of Certiorari, Randall Mill claims that Fisch has failed to demonstrate that the Georgia Mineral Rights lapse Statute is unconstitutionally vague, and assuming that the Statute was vague, the vagueness has been cured by the decision of the Georgia Supreme Court in this case. For the reasons set forth below, the Respondent's arguments fail and Fisch's Petition for Writ of Certiorari should be granted.

I. The Statute is unconstitutionally vague and indefinite.

Contrary to the Respondent's assertion, the Georgia Supreme Court's decision in this case conflicts with a decision of this Court regarding a federal question. In *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), this Court held that a state has the power to condition permanent retention of property rights on performance of reasonable conditions indicating a present intention to retain the interest which constitute a minimal burden on the owner of the interest. *Id.* at 790.

The Georgia Statute, however, alone and as interpreted by the opinion below in this case, does not impose reasonable conditions that constitute minimal burdens in order for an owner of mineral rights to retain his or her interest. The Statute provides that the mineral rights lapse if the claimant "neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing

of the petition has provided in sub-section (b) of the Code Section." O.C.G.A. § 44-5-168(a).

In an attempt to protect the Petitioners' rights, Fisch performed affirmative acts in order to preserve their interests. During the seven years prior to the institution of Randall Mill's action, Fisch regularly visited the property, searched for vein quartz samples to detect gold, took samples away in his car, did research on the ownership of the mineral rights and the possibility for commercial extraction, obtained assay reports of gold and other minerals, and studied geological maps. *See,* Petition for Writ of Certiorari at page 7. The Georgia Supreme Court's holding that these acts are insufficient to constitute working or attempting to work the mineral rights evidences the inherent vagueness of the Statute.

Moreover, also within the seven years prior to the filing of Randall Mill's action, Fisch attempted on at least two occasions to report the subject property, among others, for ad valorem tax purposes in Fulton County, Georgia. He was told by employees that there was no provision for filing or paying taxes on subsurface mineral rights separate and apart from the surface rights.[1] The fact that the Statute provides for payment of taxes in order to protect one's mineral interest where no mechanism exists to pay taxes on subsurface mineral rights further illustrates the constitutional defects of the Statute.

The Statute's vagueness is apparent especially in light of the legislative intent behind the Statute. As acknowledged by the Georgia Supreme Court, the Statute

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[1] *See,* Pet. App. 27a-28a, 44a-45a.

is meant, inter alia, to encourage collection of taxes.[2] Although there is an explicit provision in the Statute for the payment of taxes, and the legislative intent behind the Statute is to encourage the collection of taxes, the fact that no mechanism exists for the payment of taxes on mineral rights in Fulton County, Georgia renders it impossible for the owner of mineral rights to comply with the plain language of the statute.

Moreover, the Georgia Supreme Court's holding that Fisch should have filed a writ of mandamus to compel collection of taxes is not a reasonable condition or minimal burden as set forth in *Texaco v. Short*. Relying on *High Ol' Times v. Busbee*, 673 F.2d 125 (11th Cir. 1982), the Respondent contends that even if the Statute is unconstitutionally vague, the Georgia Supreme Court has cured that vagueness by requiring an owner of mineral interests to either conduct actual mining activity or to file a writ of mandamus to compel the tax commissioner to assess tax on the subsurface rights and to accept a return for taxes on them. See Respondent's Brief in Opposition to Writ of Certiorari at pp. 6-7.

The Georgia Supreme Court failed to correct the constitutional infirmities of the Statute because the conditions imposed on owners of mineral rights under *Fisch v. Randall Mill Corp.*, 262 Ga. 861, 426 S.E.2d 883 (1993) exceed the reasonable conditions which constitute minimal burdens test under *Texaco v. Short*. Therefore, the Statute has not been cured by the decision of the Georgia

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[2] *See*, Pet. App. 2a.

Supreme Court in this case, and Fisch has been unconstitutionally deprived of his property. Accordingly, Fisch's Petition for Writ of Certiorari should be granted.

II. The case presents questions of federal law which conflict with a decision of this Court.

The Respondent mischaracterizes Fisch's reliance upon *Texaco v. Short*, 444 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). Fisch does not contend that this Court held in *Texaco v. Short* that a mineral rights lapse statute must provide for the filing of a notice of claim as a mechanism to preserve an owner's mineral rights. Fisch agrees with the Respondent that this Court held in *Texaco* that performance of any one of the acts under the Indiana Statute constituted a reasonable condition that imposed only a slight burden on the owner.

The Georgia Statute, however, fails to provide such reasonable conditions that impose a slight burden on the owner in order for the owner to preserve his mineral rights. According to the Georgia Court, if an owner of mineral rights wishes to preserve his or her rights by the payment of taxes as provided for under the Statute, the owner of mineral rights must file a writ of mandamus to compel the tax commissioner to act where no taxes have been assessed and the commissioner's office refuses to accept a return for taxes on mineral interests.

As stated by the Petitioner in his Petition for Writ of Certiorari, "work" or "attempt to work" under the Statute is unconstitutionally vague given the fact that the actions of Fisch to protect his interests were declared by the Georgia Supreme Court to be insufficient to preserve

the mineral interests. Not only did Fisch perform the affirmative acts described above in Section One of this Reply, but on April 15, 1983 and again April 3, 1990, Fisch also filed an affidavit affecting title to real property with the Clerk of the Superior Court of Fulton County, Georgia, which included the subject property, within the seven years prior to the filing of Randall Mill's action. The affidavits clearly stated that Fisch was working or attempting to work his mineral rights which would put all interested parties on notice of his actions.[3] Additionally, Fisch defended an action which challenged his claim to mineral rights on property owned by another Plaintiff in that case.[4] Also, Fisch sold certain of his mineral rights interests and maintains that the selling of mineral rights constitutes working or attempting to work the mineral interests.

As stated above, the Georgia Mineral Lapse Statute also provides that an owner of a mineral interest may pay taxes on the rights in order to preserve them. Fisch repeatedly attempted to pay taxes on the mineral interests and each time returns were refused by the tax commissioner. When faced with these facts, the Georgia Supreme Court in the decision below held that Fisch should have filed a writ of mandamus to compel the tax commissioner to act. Fisch asserts that this is not a reasonable condition which imposes a slight burden on the owner of mineral interests as required by *Texaco v. Short*. Therefore, the decision of the Georgia Supreme Court conflicts with this Court's decision in *Texaco v. Short* and

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[3] *See*, Pet. App. 38a-41a.

[4] *See*, Pet. App. 24a.

review of that decision is appropriate pursuant to Supreme Court Rule 10.1.

III. This case does present a question of federal law which should be settled by this Court.

Again, the Respondent mischaracterizes Petitioners' arguments regarding the unconstitutionality of the Statute. Contrary to the Respondent's assertion, Fisch does not seek to require that all states include filing of a notice of claim as a method for avoiding the effect of a mineral lapse statute. As stated in the petition, Fisch does not challenge the authority of states to enact mineral rights lapse statutes which impose reasonable conditions which constitute minimal burdens.[5] Instead, Fisch challenges the Georgia Statute as being unconstitutionally vague and indefinite rather than the authority of the state to enact such a statute. Thus, the case does present a question of federal law which should be settled by this Court.

IV. Fisch raised the issue of unconstitutional taking of property in the Georgia Supreme Court.

The Respondent claims that Fisch failed to raise in the Court below the issue of whether the conditions imposed by the Georgia Mineral Rights Lapse Statute

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[5] The Respondent claims that other states require some level of mining activity in order for the owner of mineral rights to prevent lapse of the rights. However, mining activity is only one of the methods by which an owner of mineral rights can preserve the rights under similar statutes in other states. *See*, Pet. App. at note 32 and accompanying text.

constitute an unconstitutional taking of property. However, by launching a constitutional attack against the Statute based on lack of due process as a result of the Statute's vagueness and indefiniteness, Fisch raised the issue of unconstitutional taking of property.

The due process clause protects only against deprivation of liberty or property interests. *Wells Fargo Armed Service Corp. v. Georgia Public Service Commission*, 547 F.2d 938 (11th Cir. 1977). There is no dispute that Fisch is attempting to protect his property interest. His loss of that interest is the result of a Statute which violates the due process clause of the Fifth and Fourteenth Amendments which constitutes an unconstitutional taking of his property. Accordingly, the issue was raised in the Court below.

Respondent cites *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 1649, 118 L.Ed.2d 280 (1992) in support of its position. However, this case is inapposite. *Taylor* involved the question of whether an issue was presented in the Petition for Writ of Certiorari or raised for the first time in Petitioner's brief on the merits. Clearly, that case does not apply to the instant case.

Fisch did preserve the question of whether there was an unconstitutional taking of property, and the issue is properly before this Court pursuant to Supreme Court Rule 14.1(h).

CONCLUSION

For the reasons stated above, in addition to those stated in Fisch's Petition, a Writ of Certiorari should be granted in this case.

Respectfully submitted,

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